Supreme Court, U.S.
FILED

No. 991643 APR 11 2000

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In The

Supreme Court of the United States

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, BANK OF NEW YORK, and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do the opinion of the United States Court of Appeals for the Eleventh Circuit, and the orders or judgments of the lower courts, in the causes remanded for further proceedings in conformity with *Holywell Corporation v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed. 2d 196 (1992), conform to this Court's opinion?

Was the necessary implication of this Court's opinion, which was based on the record from the courts of appeal below, that Fred Stanton Smith breached his duty to discharge the provisions of the Internal Revenue Code applicable to fiduciaries and conspired with the Bank of New York's scheme to fraudulently impose the Miami Center Liquidating Trust's income taxes on the petitioner?

Did the settlement that the United States of America entered into with Fred Stanton Smith, revising income taxes asserted against Holywell Corporation & Subsidiaries, the Bankruptcy Estate of Theodore B. Gould, and the Miami Center Liquidating Trust, relieving him of personal liability under 31 U.S.C. § 3713(b) as an assignee of a taxpayer's property and a fiduciary and the duty to comply with the applicable provisions of the Internal Revenue Code to file returns, conform to this Court's opinion?

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PETITION FOR A WRIT OF CERTIORARI

Theodore B. Gould, *pro se*, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit, and the orders or judgments of the lower courts of the Southern District of Florida, in this cause, which was remanded for hearings in conformity with this Court's opinion, cited as ***Holywell Corporation v. Smith***, 503 U.S. 47 (1992).

OPINIONS OF OTHER COURTS

The judgment of the court of appeals (App. 1), based on 11th Cir. R. 36-1(e), that judgment has been entered without a reversible error of law and an opinion would have no precedential value, is unpublished. The order of the district court (App. 4) affirming the bankruptcy court's orders, is reported at 177 B.R. 991 (S.D. Fla. 1995). The judgment of the court of appeals, entered on August 26, 1996, dismissing the appeal of the district court's order for lack of jurisdiction under 28 U.S.C. § 1291 as a partial final judgment, because the damages had not been determined for which the Bank of New York ("Bank") was liable in accordance with ***Smith v. Bank of New York***, 161 B.R. 302 (Bkrtcy. S.D. Fla. 1993), is unreported. The district court's order (App. 26) affirming the bankruptcy court's order approving the trustee's settlement limiting the Bank's damages for negligent misrepresentation as the plan's proponent, is unreported. The bankruptcy court's final judgment (App. 36), entered on September 30, 1993, is unreported. The bankruptcy court's order (App. 63) approving settlement of the income taxes asserted against Fred Stanton Smith, acting on behalf of Holywell Corporation & Subsidiaries, the Bankruptcy Estate of Theodore B. Gould, and the Miami Center Liquidating Trust, entered on September 30, 1993, is unreported. The district court's order granting the trustee's motion to remand this case to the bankruptcy court, entered on March 25, 1993, is unreported. The bankruptcy court's cash collateral order (App. 67), requiring the

determination and payment of income taxes, entered on December 31, 1984, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The pertinent parts of the statutory provisions involved in this petition for a writ of certiorari are appended commencing at App. 71.

STATEMENT

This Court's *Holywell* Opinion

This case concerns the failure of the orders, judgments, and opinions of the lower courts in remanded proceedings to conform to this Court's *Holywell* opinion, and the plain language of the applicable provisions of the Internal Revenue Code. The question presented in the prior proceedings was:

> Is a trustee appointed by a bankruptcy court as part of a confirmed plan of reorganization to effect ***a liquidation of a debtor's estate*** (emphasis added)[1] required to file federal

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[1] The petitioner was the sole stockholder of Holywell Corporation ("Holywell"). It is an uncontroverted fact that the trustee failed to render an accounting of the original value of the property of the petitioner's estate transferred to the trustee on October 10, 1985, less proper credits, and commingled the postconfirmation claims against the Miami Center Liquidating Trust with the preconfirmation claims of creditors against the various bankruptcy estates. Compare 503 U.S. at 58; see *Restatement (2d) Trusts*, §§ 201 comment b; 202 comments j and n and illustration 28; 205 (1959) (setting forth general principles of

> income tax returns and pay federal income taxes?

The court of appeals had held, in response to the petitioner's contention that "we have jurisdiction to redress BNY fraudulent act of submitting a plan of reorganization which failed to disclose the absence of any provision relating to the payment of income taxes," ***In re Holywell Corp.***, 911 F.2d 1539, 1543 (11th Cir. 1990), that

> [t]he district court is correct in its ruling that the allegation of fraud is an attempt to modify or alter the Plan is therefore barred under the mootness doctrine.[2] The allegation seeks to alter the Plan by challenging the terms and provisions which the bankruptcy court[3] and the district court approved. We also conclude that the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the Plan.[4]

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trustee's personal liability for wrongful disbursal and commingling funds); also, ***In re Curtis***, 76 F.2d 751, 753 (2d Cir. 1935) (A trustee is not "relieved of the duty to account for the funds of the estate which comes into his hands. That duty is personal.")

[2] Compare ***United States v. Throckmorton***, 98 U.S. 61, 68 (1878) (The general maxim is that fraud vitiates every proceeding and a court of equity will set aside a judgment, on account of fraud, rendered by a court of competent jurisdiction, collateral to the matter on which the decree was rendered.) See, also, ***In re The Schooner Amistad***, 40 U.S. 518, 594 (1841) ("fraud will vitiate any, even the most solemn transactions.") (Story)

[3] The Bank's plan required the trustee to "[d]eal with the Trust Property . . . as would be lawful for any person owning the same to deal therewith," Art. V. ***Creation of Trust***, at 23.

[4] In the prior proceedings before this Court, the Bank argued:

The court of appeals held:

> [o]ur conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee[5] is responsible for such taxes. *Id.* at 1545.

Compare 26 U.S.C. § 641(b) (The tax on "[t]he taxable income of an estate or trust . . . shall be paid by the fiduciary.")

This Court's opinion reversed the judgment of the court of appeals based on the record in the courts below that the Bank's plan caused the creation of the Miami Center Liquidating Trust, 503 U.S. at 50, and vested legal title of the trust property in a trustee,[6] *Id.* at 51, which the trustee was required to liquidate and distribute to the creditors of the various bankruptcy estates, *Id.* This Court held:

> The Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an

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> [I]t would be inequitable to require an individual or entity to file returns and pay taxes ***where that individual or entity lacks authority to do so under a reorganization plan sanctioned by the bankruptcy court.*** (Emphasis added) The result . . . would require the Liquidating Trustee to ***violate the terms of the trust agreement.*** (Emphasis added)

S.Ct., ***Brief In Opposition Of Respondent The Bank of New York***, April 30, 1991, at 9.

[5] Compare Restatement (2d), ***Trusts***, § 2 (1959) (A trust is "a fiduciary relationship with respect to property, subjecting the person by whom title is held to equitable duties for the benefit of another person."

[6] The plan provided that if the Bank should "at any time desire to terminate the rights of the Trustee then acting under the Trust and appoint a new Trustee in his stead, BNY . . . may do so by a written instrument." Art. V. ***Creation of Trust***, § 11 at 26.

> income tax return. See 26 U.S.C. § 6151(a) ("[W]hen a return of a tax is required . . . the person required to make such return shall . . . pay such tax"). We conclude in this case that the trustee must pay the tax due on the income attributable to the corporate debtors' property because 6012(b)(3) requires him to make a return as the "assignee" of the "property . . . of a corporation." We further hold that the trustee must pay the tax due on the income attributable to the individual debtor's property because § 6012(b)(4) requires him to make a return as the "fiduciary" of a "trust." Finally, we decide that the United States did not excuse the trustee from these duties by failing to object to the plan. 503 U.S. at 52.

This Court also held that "[a]s the assignee of 'all' or 'substantially all' of the property of the corporate debtors, the trustee must file the returns that the corporate debtor would have filed had the plan not assigned their property to the trustee," *Id.* at 54. See App. 71, 26 U.S.C. § 6043, **Liquidating transactions**. Furthermore, this Court agreed with the petitioner's argument "that the trustee must file a return[7] because he is ***the fiduciary of a trust of an individual,***" (emphasis added). *Id.* See App. 71, 26 U.S.C. § 6034A, **Information to beneficiaries**.

In response to the argument of the United States that the bankruptcy plan substituted, at confirmation, the trustee for the petitioner "but did not alter the bankruptcy estate," 503 U.S. at 54, and, thus, Smith was a "trustee in a case under title 11,"[8] in other words, a

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[7] See 26 U.S.C. § 644. ***Taxable year of trusts***, provides, in part: "the taxable year of any trust shall be the calendar year."

[8] In ***General Litigation Bulletin No. 396***, citing the Chief Counsel's Memorandum, dated August 18, 1992, the Internal Revenue Service ("IRS") has held, concerning the question of "[w]hether a bankruptcy court has the jurisdiction to rule on the

bankruptcy trustee responsible for filing returns on behalf of the bankruptcy estate,[9] this Court concluded:

> ***The plan, as quoted above, "declared and established" the new Miami Center Liquidating Trust. It then vested all of the assets of Gould's estate to respondent Smith as trustee. The plan did not simply substitute the trustee for Gould as the fiduciary of the estate. Rather, it created a separate and distinct trust holding the property of the estate and gave the trustee control of this property.*** (Emphasis added) The Bankruptcy Code expressly permits this arrangement. See § 1123(a)(5)(B) (authorizing a plan to transfer "all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan"). ***The trustee, therefore, is not acting as the fiduciary of Gould's bankruptcy estate.*** (Emphasis added) 503 U.S. at 55.

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tax status of, and fair market value of assets transferred to, a 'liquidation trust' . . . [created] pursuant to a plan of reorganization and operating for more than three years, without filing tax returns," that "[i]n ***Holywell***, it was the Government's position that the trustee was a 'trustee in a case under title 11', within the meaning of I.R.C. § 6012(b). . . . Since a bankruptcy court does have jurisdiction over a bankruptcy trustee's tax liability, the Government did not initially contest the bankruptcy court's jurisdiction. The Supreme Court did not adopt the Government's view that the ***Holywell*** trustee is a 'trustee in a case under title 11' . . . In accordance with the Supreme Court's decisions, ***it is now our position that the court does not have jurisdiction over the postconfirmation tax consequences of the liquidation trust.***" (Emphasis added)

[9] See Restatement (2d), ***Trusts***, § 16B, *Comment* a. (A court appointed receiver "is a fiduciary that is not a trustee in the strictest sense. He does *not* hold title to the property which he administers. . . . Even a trustee in bankruptcy is not a trustee.")

Since the new Miami Center Liquidating Trust fit the description of a "liquidating trust" created for the purpose of liquidating the petitoner's estate, *Id.* at 55-56, the argument of Smith and the Bank was rejected, that "the trustee may ignore the duties imposed by §§ 6012 and 6151 because the Chapter 11 plan does not require him to pay taxes [and] . . . that § 1141(a) precluded the United States, as a creditor, from seeking payment of any taxes." This Court concluded:

> [e]ven if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind the United States or any other creditor with respect to postconfirmation claims. Cf. 11 U.S.C. § 101(10) (1988 ed., Supp. II) (defining "creditor" as used in § 1141(a) as an entity with various kinds of preconfirmation claims). 503 U.S. at 58-59.

The Remanded Proceedings

On February 2, 1993, the trustee filed a motion in the district court to remand this case to the bankruptcy court "in order that the mandate of the United States Supreme Court may be carried out." The petitioner objected that 11 U.S.C. § 105 sets forth the scope of authority granted to a bankruptcy judge within the parameters defined in 28 U.S.C § 157, and, in accordance with this Court's opinion, noted that (1) a bankruptcy judge lacked authority to issue binding orders under 11 U.S.C. § 1141(a) concerning the postconfirmation claims of the United States for the payment of income taxes, 503 U.S. at 58-59, and that (2) a court did not have authority to grant declaratory relief in a case concerning Federal income taxes.

The petitioner also argued that Smith would be a defendant in proceedings held in the district court, in conformity with this Court's opinion, because (1) the trustee's failure to discharge fiduciary duties under the applicable provisions of the Internal Revenue Code in

reliance on the Bank's indemnity[10] was negligence, fraud, conspiracy, and a breach of trust, see ***Northern Pipe Line Constr. Co. v. Marathon***, 102 S.Ct. 2858, 2877;[11] also, ***Granfinanciera S.A. et al. v. Nordberg***, 109 S.Ct. 2782, 2789;[12] and (2) the only issue which the bankruptcy court had authority to hear was the trustee's allegation that the Bank procured confirmation of its plan by a fraud on the court. ***Chambers v. NASCO, Inc.***, 111 S.Ct. 2123 (1991).[13] Despite these objections, the district court granted the trustee's motion.

On May 6, 1993, the trustee filed a "First Amended Complaint" in the bankruptcy court, alleging, *inter alia*, (1) negligent misrepresentation against the Bank as the plan's proponent for the failure to disclose a tax analysis of the plan's implementation; (2) the Bank was liable under its indemnity, holding the trustee harmless for his

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[10] The record of the prior proceedings before this Court included the Answers of Wolff, the trustee's attorney at the Miami Center's sale, that "[t]o save the Liquidating Trustee harmless . . . we obtained the [Bank's] letter of indemnity so that if any claims were made for the payment of unpaid [income] taxes . . . the Liquidating Trustee would be completely indemnifed and saved harmless from such exposure." S.Ct., ***Joint Appendix, at 170.***

[11] ***Marathon*** held, quoting ***Crowell v. Benson***, 285 U.S. 22, 64 (1932), that "the enforcement of constitutional right requires that the Federal (Art. III) court should determine . . . an issue . . . upon its own record and the facts elicited before it."

[12] ***Granfinanciera*** held, quoting ***Buzard v. Houston***, 119 U.S. 347, 352 (1886), that "[i]n cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding . . . for money had and received."

[13] ***Chambers***, quoting ***Hazel-Atlas Glass Co. v. Hartford-Empire Co.***, 323 U.S. 238, 245 (1944), held that a federal court has inherent power to set aside "fraudulently begotten judgments."

actions under the plan's provisions;[14] (3) the Bank was liable for compensatory and punitive damage for fraud and intentional misrepresentation, because (a) the plan was proposed "without provision for federal and state taxes, in direct violation of 11 U.S.C. § 1129(d),[15] in order to ensure payment . . . [of] over $27,000,000 in post-petition interest,[16] and in order to avoid payment of [income] taxes," and (b) "the Bank knowingly and fraudulently induced the Court to confirm the plan without providing for the payment of [income] taxes, since the court could not have confirmed the plan if its tax consequences had been disclosed." See 8 n. 13 *supra*.

On June 18, 1993, the bankruptcy court denied a motion filed by the United States to dismiss the trustee's amended complaint for a declaratory judgment. The motion to dismiss correctly argued, citing this Court's ***Holywell*** opinion that "[a]ny action seeking a declaratory judgment with respect to federal taxes . . . brought in bankruptcy court is thus barred by the Declaratory Judgment Act," see App. 71, and, citing ***United States v. Sherwood***, 312 U.S. 584 (1941), (2) that the United States, as "the sovereign, is immune from suit except where Congress by specific statute has waived its immunity."

During trial in the bankruptcy court, after the trustee negotiated a settlement, under which the income taxes asserted against Holywell, the Bankruptcy Estate of Theodore B. Gould, and the Miami Center Liquidating Trust

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[14] The complaint alleged that the trustee "would not have implemented the [Bank's] plan . . . without receiving the [Bank's] October 10, 1985 letter of indemnity."

[15] 11 U.S.C. § 1129(d) provides, in part: "[T]he court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes." Compare 3 n. 4 *supra*.

[16] See ***United Sav. Ass'n. v. Timbers of Inwood Forest Assocs.***, 404 U.S. 365, 372-373 (1988) (11 U.S.C. § 506(b) precludes the allowance of postpetition interest to an undersecured creditor.)

were revised and Smith was relieved of personal liability, see 31 U.S.C. § 3713(b), the trustee dismissed his fraud claim against the Bank on the grounds that fraud requires proof of intentional misrepresentation, and the evidence did not show that the Bank had intended to misrepresent the tax consequences of the plan's implementation. Thus, on September 24, 1993, the Bank was held liable under its indemnity *only* for negligent misrepresentation as the plan's proponent, and the trustee did not seek punitive damages for the Bank's misconduct, although the bankruptcy court concluded:

> In this case, there is no dispute that the bank failed to include any analysis of the tax consequences of the proposed reorganization scheme in its disclosure statement,[17] or any provision for payment of taxes in its plan. The law requires an analysis of the tax consequences and provision for payment. See 11 U.S.C. § 1129 (Citation omitted). . . . As such, ***the bank's representations concerning the feasibility of the plan and the Trustee's obligations under the plan were materially false.*** (Emphasis added)

See also 4 *supra*, quoting 26 U.S.C. § 641(b). Compare 3 n. 4 *supra*. Notwithstanding the bankruptcy court's findings of fact concerning the Bank's misconduct and the record of the proceedings concerning the trustee's breach of trust, attributable to his failure to discharge the duties

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[17] The Bank's disclosure statement falsely alleged that "[t]he Bankruptcy Court has determined that the Washington Proceeds [$32,422,798] are BNY's cash collateral . . . subject to BNY's security interests." C.P. No. 403 at 20. Compare 161 B.R. at 304 ("The assets of the [Miami Center Liquidating] Trust also included, *inter alia*, the gross proceeds from the sale of the Washington properties even though the order on the bank's cash collateral lien extended only to the net proceeds"). Compare ***Miami Center Limited Partnership v. Bank of New York***, 838 F.2d 1547, 1550 (11th Cir. 1988) (the bank "released the $30 million of additional cash collateral.")

imposed on assignees and fiduciaries under the applicable provisions of the Internal Revenue Code, the bankruptcy court denied the petitioner's counterclaims against Smith, individually and as trustee of the Miami Center Liquidating Trust, and held:

> [t]here was no credible evidence which showed the Trustee knew, or under the circumstances, should have known that he was responsible for the taxes prior to the Supreme Court's ruling, App. 44;

the failure of a fiduciary to discharge duties imposed by law is not gross negligence, App. 45;

The debtors and their accountants led the Trustee to believe they would file tax returns and pay taxes, App. 45; and

The only evidence of the alleged conspiracy . . . is the letter of indemnity between the bank and the Trustee [which] . . . is not sufficient to prove an agreement to . . . accomplish an unlawful purpose. App. 48.

The bankruptcy court's findings of fact and conclusions of law, drafted by the trustee's attorney, also held:

> [t]he [Bank's] nominee paid the purchase price by crediting the amount of the mortgage obligation against the purchase price,[18]

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[18] See *In re Holywell Corp.*, 901 F.2d 931, 934 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991) ("The amount of interest . . . was included in the Bank's bargain for the purchase of the [Miami Center] project.") Compare *Miami Center*, 838 F.2d at 1555 ("The debtors acknowledge that the plan of reorganization has been substantially consummated, but . . . [t]he trustee is claiming substantial additional sums from the bank as a result of examination and audit of the bank's interest charges [$13,130,086].")

including post-confirmation [sic] interest[internal f.n.2]

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[2] The Debtors complain that the Trustee wrongfully permitted the bank to receive credit of $27 million for post-petition interest.[19] Their prior challenge to this credit failed. See ***In re Holywell***, No 88-151 slip op. (S.D. Fla. July 21, 1988).[20] App. 41.

The Trustee's former counsel (Holland & Knight) . . . advised the Trustee that the trust had no tax responsibility. App. 44.

In order to determine his responsibilities, the Trustee filed the instant adversary proceeding . . . for declaratory relief of the question of the Trust's tax liability. . . .[21] Upon remand, the Trustee ***amended his adversary complaint*** to pursue claims against the bank ***and to determine***

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[19] Compare 9 *supra*, quoting the trustee's amended complaint, alleging the Bank's fraud.

[20] The district court found that "[i]n certain answers to interrogatories propounded to Wolff . . . he reveals that the trustee herein sought and obtained indemnification from BONY 'because the Confirmation Order found the Bank to be an undersecured creditor and in the closing adjustments the Bank took credit for post-filing interest in the amount of $27,050,115. This indicates that the trustee sought to protect his position due to concern over the credit for post-petition interest provided for in the Plan of Reorganization."

[21] Compare the trustee's adversary complaint for declaratory relief "request[ed] the Court to order the debtors to: a. Prepare and file a tax return reflecting any tax liability from the sale of the Washington properties[;] b. Prepare and file a fiscal 1985-1986 tax return reflecting any tax liability from the sale of the Miami Center properties." See 503 U.S. at 52 ("The Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an income tax return.")

> ***the amount and priority of the taxes due the United States.*** (Emphasis added) App. 42.
>
> . . .
>
> None of the tax authorities have pursued claims for penalties or sought to recover against Mr. Smith individually.[22] App. 44.

The bankruptcy court denied the petitioner's counterclaim, alleging gross negligence, on the grounds that "[t]he undisputed facts offered at trial show that the Trustee acted properly. . . . This conduct reflects a degree of care and a proper and reasonable response to a highly unusual and difficult problem," App. 45.[23] The bankruptcy court also denied that the trustee's failure to discharge duties imposed on fiduciaries under the applicable provisions of the Internal Revenue Code was a

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[22] In the prior proceedings before this Court, the Government argued that "[t]he collateral consequence that occurs if the trustee is deemed to be an assignee is somewhat significant. . . . The United States would have an absolute priority for the payment of taxes under the absolute priority statute [31 U.S.C. § 3713] . . . and the trustee would also be personally liable for taxes under 3713(b)." S.Ct., ***Transcript***, December 4, 1991 at 15.

[23] The ***IRS Holywell Report***, issued on July 14, 1992, imposed penalties on the trustee "for negligence and failure to file under Sections 6653(a), 6662 and 6651(a) of the Internal Revenue Code," and concluded:

> Instead of going to the court immediately upon his appointment to determine his responsibility for the federal taxes . . . he went to the Bank of New York, asked for, and received from them indemnification against personal liability. The Trustee did not commence the proceeding in the bankruptcy court . . . until December 27, 1987. By this time the plan was substantially consummated. . . . ***A ruling against the Trustee would mean the plan . . . should not have been confirmed in the first place.*** (Emphasis added)

breach of trust, in reliance on a prior opinion of the district court, ***In re Holywell Corp.***, 93 B.R. 780, 783 (S.D. Fla. 1986), and held:

> In a related proceeding in which the debtors sought damages against the Trustee and the bank for, *inter alia*, the failure to establish reserves for taxes, the district court held that the Trustee does not owe the debtors ordinary ***common law*** (emphasis added) fiduciary duties, but only those duties defined by the confirmed plan. App. 47.

Compare 503 U.S. at 58 ("The respondents finally assert that the trustee may ignore the duties imposed by §§ 6012 and 6151 because the Chapter 11 plan does not require him to pay taxes. . . . We disagree.") The bankruptcy court concluded that the district court's opinion was "binding upon the issue of the standard of care required by the Trustee." App. 48. The counterclaim alleging conspiracy with the Bank to impose the Miami Center Liquidating Trust's income taxes on the petitioner was denied on the grounds that "[t]he court does not believe that the mere existence of the indemnity agreement is proof of a conspiracy to evade the payment of taxes." App. 49.

The bankruptcy court's judgment denying the petitioner's counterclaims also relied on *res judicata* and collateral estoppel, App. 49; waiver and estoppel, App. 50; contributory negligence, App. 51; the trustee relied on Holland & Knight's advice, citing ***Scalise v. Nat'l Utility Svc.***, 120 F.2d 938 (5th Cir. 1941), App. 52;[24] derived judicial immunity as an "arm of the court," citing ***In re***

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[24] Compare ***Scalise*** held "[i]t has never been held that advice of counsel is a defense where the advice was to the effect that one could legally do something which was contrary to good morals and fair conduct." 120 F.2d at 941.

Jacksen, 105 B.R. 542 (9th Cir. B.A.P. 1989),[25] because the trustee "performed an integral part of the judicial process by carrying out the plan and acting pursuant to court orders," App. 52; the petitioner is guilty of inequitable conduct and appear[s] before the court with unclean hands . . . for misconduct involving interference with the administration of the trust and conversion of its assets,"[26] App. 55; and mootness because the bankruptcy court had previously held the Bank liable for negligent misrepresentation as the plan's proponent and enforced its indemnity, App. 56.

The bankruptcy court denied the petitioner's cross-claims against the bank for negligent misrepresentation, fraud in connection with a case under title 11, and also denied the cross-claims in reliance on the doctrine of waiver and estoppel, App. 58; and *res judicata*, App. 58. The court held that "[a]ny claim or injury prior to discharge would, under the confirmed plan and Bankruptcy Code § 541(a), be a chose in action belonging to the Miami Center Liquidating Trust and not to the debtors," App. 59. Compare 503 U.S. at 56 ("A fiduciary is a person who holds in trust an estate to which another has the beneficial title.")

On September 30, 1993, the bankruptcy court approved the trustee's joint motion with the United

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[25] Compare *Jacksen* held that the doctrine of derived judicial immunity "is not unlimited" and, quoting *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983), concluded that a "trustee may be liable for negligent as well as intentional conduct pertaining to duties placed on him by law." 105 B.R. at 544.

[26] Compare App. 43 ("these counterclaims and cross-claims are not the first time such allegations have been made. . . . The debtors unsuccessfully sued Mr. Smith and the bank for, *inter alia*, failing to establish reserves for taxes. (Citation omitted) They also caused four of Holywell's subsidiaries to sue Mr. Smith and the bank in Virginia for, *inter alia*, his handling of the tax issues.")

States of a settlement of income taxes[27] asserted against Holywell Corporation & Subsidiaries,[28] the Bankruptcy Estate of Theodore B. Gould,[29] and the Miami Center Liquidating Trust.[30] The settlement provided, in part:

> (3) there shall be no tax attribute carryovers available to Holywell Corporation and subsidiaries as of July 31, 1993, the bankruptcy estate of Theodore B. Gould as of October 10, 1985, or the Miami Center Liquidating Trust as of December 31, 1993, except that the Miami Center Liquidating Trust is entitled to deductions

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[27] The Government's attorneys and the trustee excluded the petitioner, and Holywell's counsel, from participation in the settlement negotiations on the grounds of confidentiality.

[28] The ***IRS Holywell Report*** at 39-40 concluded that the Bank's plan was a scheme to avoid the payment of income taxes, and thus, asserted that Holywell was liable for taxes attributable to the trustee's sale of the Miami Center and the Miami Center Liquidating Trust's interest income.

[29] The ***IRS Report on the Bankrutpcy Estate of Theodore B. Gould***, issued on December 16, 1992, concluded that the transfer of the bankruptcy estate's property to the Miami Center Liquidating Trust on October 10, 1985, including Holywell's capital stock, was a taxable event which must be treated as a sale at fair market value, causing a capital gain of $38,800,228, and an alternative minimum tax of $1,218,732.

[30] The ***IRS Report on the Miami Center Liquidating Trust***, issued on January 5, 1993, concluded that the Miami Center Liquidating Trust was a separate taxable entity in accordance with 26 U.S.C. § 7701, and based on its prior conclusion that the trustee misappropriated Holywell's cash and property, instead of causing a liquidating dividend distribution to be made to the Miami Center Liquidating Trust in accordance with 26 U.S.C. § 361(c) (1954), pursuant to the plan of reorganization, see ***General Utilities and Operating Co. v. Helvering***, 296 U.S. 200, 204 (1935) ("the declaration and payment of the dividend resulted in no taxable income") asserted taxes, in the amount of $2,832,034, which the trustee had previously paid in full on April 14, 1992, in the amount of $2,920,000.

> for the Trust's distributive share of the Miami Center Joint Venture's losses in the taxable year ending December 31, 1993, or in a subsequent taxable year or years. . . .

Bkrtcy. S.D. Fla., ***Joint Motion***, September 2, 1993, at 5.

On June 22, 1994, the bankruptcy court approved the trustee's joint motion with the Bank to limit the Bank's liability for damages. The settlement provided:

> [T]he Bank agrees to the entry of a judgment on the damages . . . in favor of the Trustee and against the Bank in the amount of $15,000,000.00 (the "Judgment"). The judgment shall provide that the Bank is entitled to set off the judgment debt against the Trustee's indebtedness to the Bank under the Trustee's Certificate. . . . As a result of such setoff, the Bank shall have no duty to make any payment to the Trustee under the Judgment.

The bankruptcy court found that "the settlement of $15 million payable by the Bank is approximately 77% of the sum the Trustee could hope to recover," App. 32. Compare 18 n. 32 *infra*.

On January 25, 1995, the district court held that the bankruptcy court did not abuse its discretion in denying the petitioner's motions for a separate trial, App. 17, to amend the counterclaims and cross-claims in accordance with 18 U.S.C. § 1961 for "fraud in a case connected with title 11," and 18 U.S.C. § 1962 for conspiracy, and to enjoin the trustee from using the Miami Center Liquidating Trust's funds to pay income taxes asserted against Holywell Corporation & Subsidiaries.

The district court applied the clearly erroneous standard of review to the bankruptcy court's verbatim adoption of the findings of fact drafted by the trustee's attorney, notwithstanding the petitioner's timely objections, see 28 U.S.C. § 157(c)(1), see App. 72, and concluded:

> . . . the Bankruptcy Court had subject matter jurisdiction over the Debtors' counterclaims and

> cross-claims pursuant to 11 U.S.C. § 505(a);[31] 28 U.S.C. § 157(b)(2)(A) and § 157(b)(2)(O) [footnote omitted]. App. 20.

The district court also held that the bankruptcy court's order denying the petitioner's motion to enjoin the trustee's use of the Miami Center Liquidating Trust's funds to pay income taxes asserted against Holywell Corporation & Subsidiaries was in conformity with this Court's opinion, App. 23.

On August 26, 1996, the court of appeals dismissed the petitioner's appeal of the district court's order, cited as ***In re Holywell Corp.***, 177 B.R. 991 (S.D. Fla. 1995), pursuant to 28 U.S.C. § 1291 as a partial final judgment, which failed to resolve the question of the amount of damages for which the Bank was liable for negligent misrepresentation as the plan's proponent.

On July 7, 1997, the district court affirmed the bankruptcy court's order approving the trustee's settlement with the Bank, limiting the Bank's liability for damages to *$15,000,000*, and held:

> The issues of settlement are directly related to the Trustee's duties of administration pursuant to the Chapter 11 plan. See 28 U.S.C. § 157(b)(2)(A) and (b)(2)(O). . . .
>
> The amounts for the settlement[32] for non-disclosure of the plan's tax consequences and

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[31] Compare 5 n. 8 *supra*.

[32] The trustee's damage settlement with the Bank failed to compensate the Miami Center Liqudiating Trust for the full amount of income taxes paid, *$15,946,485.82*; omitted accrued interest of *$15,269,243* as of April 5, 1994, attributable to the Bank's wrongful subordination of MCJV's claims, 913 F.2d at 880, and the trustee's failure to pay MCJV's claims in accordance with the plan's provisions in reliance on the Bank's indemnity, because the plan failed to provide for the payment of income taxes; fiduciary fees, attorneys' fees, and accounting expenses in the amount of *$7,225,682.86*, which the Trustee incurred as of September 9, 1998, to defend the Bank's scheme to

> the Trustee's Certificate issue are set off for a net recovery by the Bank. The Trustee has reached a settlement with the government concerning the amount of federal taxes owed, and the settlement with the Bank of New York reflects a reasonable resolution of the issues. App. 27.

REASONS FOR GRANTING THE WRIT

The unpublished opinion in this remanded proceeding, entered almost eight years after this Court's *Holywell* opinion was issued, shows the abuse of the judicial process when the proceedings in a trial court are biased and the opinion of the appellate courts depart from justice, equitable rights, and the plain language of the laws of the United States.

1. The Rule In Remanded Proceedings

The threshold question presented in the remanded proceedings for hearings in conformity with this Court's *Holywell* opinion is the extent of the jurisdiction of the courts below. It is a settled and fundamental rule, affirmed in cases too numerous to cite, that

> [w]hatever was before the [Supreme] court, and is disposed of, is considered finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief, nor review it upon any matter decided on appeal for

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impose the Miami Center Liquidating Trust's income taxes on the petitioner; omitted federal income taxes of *$22,871,041* attributable to MCJV's cancellation of debt income of *$57,639,444* and the *$15,000,000* judgment against the Bank which the trustee has failed to report as taxable income. Compare 17 *supra* (the trustee's settlement represents "77% of the compensatory damages".)

> error apparent; nor intermeddle with it, further than to settle so much as has been remanded.[33]

Although the lower courts were free on remand as to all issues not within the compass of this Court's mandate, ***Spague v. Ticonic Nat'l Bank***, 307 U.S. 161, 168 (1938), this Court's "cases [have] held that 'a court lacks discretion to consider the merit of a case over which it is without jurisdiction'," ***Firestone Tire & Rubber Co. v. Risjord***, 449 U.S. 368, 379-80 (1981).

(a) **11 U.S.C. § 505(a) Is Not Applicable To Post-confirmation Taxes** – In this case on remand, the trustee amended his adversary complaint for a declaratory judgment "to determine the amount and priority of the taxes due the United States," 12 *supra*. Compare 503 U.S. at 58-59 (§ 1141(a) is binding only with respect to preconfirmation claims.)

The court of appeals' affirmance of the district court's opinion that the bankruptcy court had subject matter jurisdiction under 11 U.S.C. § 505(a), creates a second tax court for which there is no statutory authority, and is in direct conflict with ***Quattrone Accountants v. IRS***, 895 F.2d 921 (3d Cir. 1990). ***Quattrone*** held:

> Section 505 contemplates the natural situation where a tax liability issue in bankruptcy arises with respect to a debtor. . . . ***Congress' intent clearly was not to create another tax court.*** . . . This section is contained in a subchapter devoted to "Creditors, the Debtor and the Estate." ***This context highlights the limited application of Section 505. . . . Given the placement of Section 505, this would be an unusual location to insert a provision granting broad jurisdictional powers.*** The limited scope of section 505 is also borne out in the legislative history which states that Section 505(a) permits

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[33] ***Sibbald v. United States***, 37 U.S. 488, 492 (1838); see also ***In re Sanford Fork & Tool Co.***, 160 U.S. 247, 255 (1895).

> "determination by the bankruptcy court of any unpaid tax liability of the debtor." *S. Rep. No 989 95th Cong. 2d Sess. 67.* 895 F.2d at 925. (Emphasis added)

In conformity with this Court's opinion, the IRS has held concerning the question of whether a bankruptcy court has jurisdiction to determine postconfirmation tax liabilities in a proceeding under the Declaratory Judgment Act, 28 U.S.C. § 2201, that

> [a]ny action seeking a declaratory judgment with respect to federal taxes brought in bankruptcy court is barred by the Declaratory Judgment Act, unless it comes within the scope of Bankruptcy Code §§ 505 or 1146. See H.Rep. No. 95-59, 95th Cong., 1st Sess. 450 (1977). . . . Section 1146(d) is the sole source of a bankruptcy court's jurisdiction to determine the tax consequences of a reorganization proposed as part of a Chapter 11 plan, whether the tax consequences are federal state, or local. ***The legislative history shows that Congress twice rejected attempts to amend section 1146(d) to permit a bankruptcy court to determine the Federal Tax Consequences of a proposed reorganization.*** (Emphasis added) . . . ***The legislative history of section 505 reveals that the scope of that section extends only to tax consequences of events which have already occurred. . . . No mention is made of the court's authority to determine the tax effect of a proposed reorganization.*** (Emphasis added)

General Litigation Bulletin No. 391, citing the Chief Counsel's letter to District Counsel, March 23, 1993.

Congress established the Tax Court "to furnish a forum where full payment of the assessment would not be a condition precedent to suit. The result is a system in which there is one tribunal for prepayment litigation and another for post-payment litigation," ***Flora v. United***

States, 362 U.S. 145, 163 (1960), and *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1961), held:

> The manifest purpose of [26 U.S.C.] § 7421 is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. . . . Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail . . . the attempted collection may be enjoined if equity jurisdiction otherwise exists.

(b) **The Petitioner's Postconfirmation Counterclaims And Cross-claims Were Not Core Matters** – The court of appeals' affirmance of the district court's opinion that (1) the petitioner's postconfirmation counterclaims and cross-claims, alleging gross negligence, fraud, breach of fiduciary duty, and conspiracy, and that (2) the trustee's settlement limiting the damages for which the Bank was liable, were core matters concerning the administration of the bankruptcy estate under 28 U.S.C. § 157(b)(2)(A) and § 157(b)(2)(O), are in direct conflict with the compass of this Court's mandate that the Miami Center Liquidating Trust is *not* a bankruptcy estate, 503 U.S. at 55, and the new Miami Center Liquidating Trust was a separate and distinct liquidating trust, created after confirmation pursuant to 11 U.S.C. § 1123(a)(5)(B). ***Id.***

The bankruptcy court's administration of the estate created under 11 U.S.C. § 541(a) was terminated as an effect of confirmation of the Bank's plan, see ***United States v. Redmond***, 36 B.R. 932, 934 (D.Kan. 1984), and "28 U.S.C. § 157(b)(2)(B) clearly defines as core those proceedings that deal with the allowance or disallowance of claims against the property of the [bankruptcy] estate," ***In re Johnson***, 960 F.2d 396, 401 (4th Cir. 1992). See 503 U.S. at 59 (A creditor under title 11 is a person with a preconfirmation claim.)

In re Wolverine Radio Co., 930 F.2d 1132, 1137 (6th Cir. 1991), held, quoting *In re Pacor, Inc.*, 743 F.2d 984, 994 (3d Cir. 1984):

> ***The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether that outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.*** (Emphasis added). . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which ***in any way impacts upon the handling and administration of the bankruptcy estate.*** (Emphasis added)

Wolverine Radio also held that "[s]ection 157 does not give bankruptcy courts full judicial power over all matters over which the district courts have jurisdiction under section 1334," 930 F.2d at 1244, and held:

> The phrase "arising under title 11" describes those proceedings that involve a cause of action created or determined by a statutory provision of title 11, 1 *Collier on Bankruptcy* § 3.01[1] [c] [iii], and "arising in" proceedings are those that, by their very nature, could arise only in bankruptcy cases. *Id.* at § 3.01 [1] [c] [v]. Conversely, ***if the proceeding does not involve a substantial right created by federal bankruptcy law and is one that could exist outside of the bankruptcy, then it is not a core proceeding.*** (Emphasis added). ***In re Wood,*** 825 F.2d at 97. Such a proceeding may be related to the bankruptcy, but it would not be a core proceeding within the meaning of section 157(b). 930 F.2d at 1144.

In this case, the petitioner's postconfirmation counterclaims and cross-claims may be "related to" a case under title 11, but the claims are not core matters for which a bankruptcy court has authority to enter a final judgment, subject only to appellate review under the

clearly erroneous standard in the district court. See ***Marathon*** n. 13 *supra*; ***Granfinanciera*** n. 14 *supra*. Thus, 18 U.S.C. § 1961, *et seq.*, was the only federal civil remedy to contest fraud connected with title 11, with respect to a new liquidating trust created under 11 U.S.C. § 1123(a)(5)(B), for the purpose of executing a scheme to defraud the petitioner based on conduct which clearly violated the Internal Revenue Code, see ***Hofstetter v. Fletcher***, 905 F.2d 897, 902-903 (6th Cir. 1988), and the district court's opinion was clearly erroneous that the bankruptcy court did not abuse its discretion in denying the petitioner's motion for a separate trial, App. 17. See 20 *supra*, quoting ***Firestone Tire***, 449 U.S. at 379.

2. Smith Breached His Fiduciary Duty And Conspired With The Bank's Fraudulent Purpose To Impose The Miami Center Liquidating Trust's Income Taxes On The Petitioner.

Seminole Nation v. United States, 62 S.Ct. 1049, 1055, n. 12 (1942), held, quoting ***Meinhard v. Salmon***, 249 N.Y. 458, 164 N.E. 545, 546 (1928), that

> [m]any forms of conduct . . . are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. . . . Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty.

See Restatement (3d), ***Trusts***, § 170(1) ("The trustee is under a duty to the beneficiary in administering the trust *not* to be guided by the interests of a third person.")

It is an uncontroverted fact in this case, and the necessary implication of the record of the proceedings upon which this Court's prior opinion was issued, and the testimony of witnesses in the remanded proceedings, that the Bank's fraudulent purpose of the Miami Center Liquidating Trust's creation, and Smith's appointment as

trustee, was, *inter alia*, to impose the Miami Center Liquidating Trust's income taxes on the petitioner,[34] see 503 U.S. at 56.

The trustee's first attorney has testified that the trustee sought the Bank's indemnity, because under the bankruptcy court's Cash Collateral order, entered on December 31, 1984, App. 68,

> the estate was charged with protecting the United States of America's (Internal Revenue Service) claim . . . and in accordance with the terms and provisions of the confirmed Plan, the

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[34] The testimony of James Hamilton, the Bank's officer, was:

> STETTIN: The order which I am referring to is one signed by Judge Britton on December 31, 1984. It is styled "Order On Emergency Motion To Treat Proceed Of The Sale As Cash Collateral" . . . and on page 2, paragraph C, Judge Britton says, "It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, that partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid" do you recall reading that?
>
> HAMILTON: Yeah, I do.
>
> STETTIN: Who did you understand would be responsible for the payment of income taxes under the terms of the plan?
>
> HAMILTON: I would assume it would be Mr. Gould.
>
> STETTIN: Why did you think that?
>
> HAMILTON: Well, he owned the property.
>
> STETTIN: What assets was Mr. Gould to use to pay those taxes if there were any income taxes that were to be due?
>
> HAMILTON: To the extent that the taxes were payable it would have been Mr. Gould's obligation.

> entire $30 million net proceeds were made available to pay unsecured creditors, although the Cash Collateral Order limited the Bank's lien to a dividend distribution in liquidation of the nonfiled [Holywell's] corporate subsidiaries.

This Court found that the Bank's plan permitted Holywell "to remain in business," 503 U.S. at 50, in reliance on the false representation of the Bank's attorneys to this Court that after the payment to creditors was completed,

> [t]he debtors would then have received back property having substantial value, including the property of Holywell with its business unchanged. By the use of these assets subsequently acquired, the reorganized debtors would have been in a position to pay any taxes that might have been due when income from the trust transactions was combined with items of income deduction and loss realized by the debtors in their postconfirmation activities.

S.Ct., ***Brief For Respondent The Bank of New York***, at 16-17.

The trustee's accounting commingled postconfirmation claims against the Miami Center Liquidating Trust with the preconfirmation claims of creditors against the various bankruptcy estates. S.Ct., ***Joint Appendix*** (Bkrtcy. S.D. Fla., ***Transcript***, February 11, 1988), at 116. See 2 n. 1 *supra*.

Based on the Bank's representations, the bankruptcy court's Cash Collateral order, App. 68 (requiring the determination and payment of Holywell's income taxes attributable to the sale of the Washington properties), and the legal advice of Holland & Knight, the trustee's attorney, that the Miami Center Liquidating Trust was not a taxable entity, see 503 U.S. at 58, n. 1, and the trustee was not an assignee of Holywell's property, Holywell's accountants represented to the trustee that Holywell would pay the corporate income taxes due for the tax year ended July 31, 1985. See 11 *supra*.

During oral argument before this Court, the trustee's counsel conceded that "[t]he plan would not have been confirmable because one of the requirements under section 1129(a)(11) is that the plan be shown to be capable of successfully being carried out," see 13 n. 23 *supra* ("A ruling against the Trustee would mean the plan . . . should not have been confirmed.") and later testified that the trustee conspired with the Bank to deprive this Court of jurisdiction, under the mootness doctrine applicable in bankruptcy proceedings, to grant the petitioner judicial relief to the bankruptcy court's order confirming the Bank's plan.[35] S.Ct., ***Transcript***, December 4, 1991, at 23.

3. The Tax Settlement Does Not Conform To This Court's Opinion And Fails To Satisfy Filing Requirements.

Under the plain language of 26 U.S.C. § 7701(a), the Miami Center Liquidating Trust and Holywell Corporation were separate taxable entities, and during the prior proceedings before this Court, the United States argued,[36]

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[35] STETTIN: ***The trustee commenced substantial consummation of the plan deliberately as soon as the plan became effective. Mr. Wolff has testified that the reason they did that was . . . in an attempt as best they could moot any appeals that were being taken. The Bank wanted the plan to be substantially consummated as soon as possible and Mr. Wolff agreed with that theory.*** (Emphasis added)

[36] The Solicitor General argued that "[r]espondents assert . . . that the corporate debtors have emerged from bankruptcy and are now being 'operated' under their own management. ***It is true that they continue to litigate with the trustee, but they were left, under the Bank's plan, with nothing. That plan provided for the transfer of all the corporate debtors' assets to the liquidating trust*** (J.A. 41). ***Debtors' management was left in charge of the shell; the trustee had the assets.***" (Emphasis added)

and this Court agreed, that Holywell had been liquidated[37] upon the transfer of its assets to the trustee, see 503 U.S. at 53 ("The plan . . . transferred the corporate debtors' estates to respondent Smith as trustee of the Miami Center Liquidating Trust.") Thus, in accordance with 26 U.S.C. § 6043, the trustee was required to file a return, no later than November 9, 1985, showing the transfer of Holywell's property on October 10, 1985, to the Miami Center Liquidating Trust pursuant to the Bank's plan, 503 U.S. at 54, ("the trustee must file returns that the corporate debtors would have filed"), and seek relief from the District Director from filing federal income tax returns for the corporation for the tax years ending after October 10, 1985.[38] Instead, the Justice Department's attorneys failed to disclose until May 21, 1995 that the trustee had been relieved of the statutory obligation to file returns as the assignee of Holywell's property, compare 503 U.S. at 53, and relieved Smith of penalties for negligence, 13 n. 23 *supra*, upon the payment of

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[37] The ***IRS Holywell Report*** at 36 concluded that either the trustee misappropriated Holywell's cash under the substantive consolidation provision of the Bank's plan to pay the claims of creditors against MCLP's estate for which Holywell was not liable *or* "[s]ection 361(c) of the [Internal Revenue] Code provides that [no gain or] loss shall be recognized to a corporation a party to a reorganization on the distribution to its shareholders of property in pursuance of the plan of reorganization."

[38] Rev. Rule 84-123 holds that "[u]pon presentation of the facts to the district director, a[n] assignee of a corporation . . . in dissolution or in the hands of an assignee by order of a court of competent jurisdiction . . . may be relieved from filing federal income tax returns for the period after dissolution has occurred in fact, that is, it has ceased business operations and has neither assets nor income," and section 1.6012-2(a)(2) of the Income Tax Regulations provides that a corporation is not in existence for tax purposes after it ceases business and dissolves, retaining no assets.

$10,000,000 after revising the income tax liabilities erroneously asserted in the ***IRS Holywell Report***, in the amount of *$19,144,838*, for the fiscal year ended July 31, 1986, attributable to capital gains of *$74,673,800*, allegedly incurred as a result of the trustee's sale of the Miami Center;[39] a tax liability of *$193,384* for the fiscal year ended July 31, 1987, and *$246,971* for the fiscal year ended July 31, 1989, attributable to the Miami Center Liquidating Trust's interest income; and tax liabilities of *$810,513* for the fiscal year ended July 31, 1990, attributable to interest income due on "super-priority" loans which remain unpaid. Thus, the bankruptcy court approved a tax settlement for years in which Holywell had no assets, ceased business, and had no income.

The plain language of 26 U.S.C. § 1398(i) provides that the discharged debtor shall succeed to the estate's tax attributes, and 26 U.S.C. § 642(h) provides that upon termination of a trust, the trust's unused net operating losses and capital losses are allowed to the trust's beneficiary, nevertheless the settlement provides, without the petitioner's consent and participation in the negotiations under which the trustee was relieved of personal liability for negligence, that there shall be no carryovers of the net operating losses of the bankruptcy estate of Theodore B. Gould as of October 10, 1985, in the amount of

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[39] The IRS auditor, testified in response to the question of whether the transfer of the assets of MCLP's estate to the Miami Center Liquidating Trust, at a cost basis increased to fair market value to eliminate capital gains attributable to the trustee's sale of the Miami Center, was a scheme to avoid the trustee's payment of income taxes:

> A. [W]hat they are saying here is that a trustee would acquire the basis equal to fair market value of the property, and, therefore, the basis would equal sales price and, therefore, ***there would be no tax liability***. (Emphasis added)

Bkrtcy. S.D. Fla., ***Deposition***, June 10, 1993, at 81.

$18,180,307, and the Miami Center Liquidating Trust's tax attributes are forfeited as of December 31, 1993, 16 *supra*.

This Court's opinion held that the trustee must make a return because "[s]ection 6012(b)(4), as the debtors assert, applies to a fiduciary of a trust as well as the fiduciary of a bankruptcy estate," 503 U.S. at 55. Thus, the trustee was required to file a fiduciary income tax return for the tax year ended December 31, 1985, showing the dividend income from Holywell's liquidation, and reporting an income distribution deduction under 26 U.S.C. § 661 for the claims of creditors paid on behalf of the petitioner, see 503 U.S. at 56, (The trust was created "for the express purpose of liquidating Gould's estate and distributing it to creditors.") Instead, the Justice Department's attorneys agreed to relieve the trustee, without the petitioner's consent, of filing fiduciary income tax returns for the Miami Center Liquidating Trust, and thus, reporting and filing a Form 1041, Schedule K-1, in accordance with the requirements of 26 U.S.C. § 6034A, for each of the tax years ended December 31, 1985 through December 31, 1992.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-0023

D.C. Docket Nos.
94-111-Civ-ARONOVITZ(LCN)
84-01590-BKC-PGH,
87-0627-ADV-PGH

IN RE: HOLYWELL CORPORATION, CHOPIN ASSOCIATES, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORP., THEODORE B. GOULD,

Debtors.

HOLYWELL CORPORATION, THEODORE B. GOULD,

Plaintiffs-Appellants,

versus

FRED STANTON SMITH, BANK OF NEW YORK,

Defendants-Appellees.

No. 97-0024

D.C. Docket Nos. 94-1540-CIV-LCN
84-1590-BKC-PGH,
94-0014 (Adv.)

IN RE:
HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION., CHOPIN ASSOCIATES, THEODORE B. GOULD,

Debtors.

HOLYWELL CORPORATION, THEODORE B. GOULD,

Plaintiffs-Appellants,

versus

BANK OF NEW YORK,
FRED STANTON SMITH, Liquidating Trustee,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(January 26, 2000)

Before TJOFLAT, Circuit Judge, FAY, Senior Circuit Judge, and HANCOCK*, Senior District Judge.

PER CURIAM:

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* Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

AFFIRMED: *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-0111-CIV-ARONOVITZ
BKC Nos. 84-01590-BKC-PCH
84-01591-BKC-PCH
84-01592-BKC-PCH
84-01593-BKC-PCH
84-01594-BKC-PCH
Adversary No. 87-0627-BKC-PCH-A

IN RE: HOLYWELL CORPORATION, *et al.*

Debtors.

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HOLYWELL CORPORATION and THEODORE B. GOULD,

Appellants,

vs.

THE BANK OF NEW YORK, and FRED STANTON SMITH, Individually and as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Appellees.

_____/

FINAL ORDER AFFIRMING BANKRUPTCY COURT'S ORDERS

(Filed Jan. 20, 1995)

BEFORE THIS COURT is Holywell Corporation and subsidiaries, and Theodore B. Gould ("Debtors") appeal from the following Orders entered by the Bankruptcy Court:

1. United States Bankruptcy Judge Sidney M. Weaver's Order Denying Motion of Defendants Theodore B. Gould and Holywell

Corporation to Amend Answer and to Join Additional Parties, dated June 28, 1993;

2. Judge Weaver's Order Denying Defendant Theodore B. Gould's Motion for Separate Trial, dated June 28, 1993;[2]

3. Judge Weaver's Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee from Use of Trust Funds to Pay taxes, Etc., dated August 27, 1993;

4. Judge Weaver's Final Judgment on the Debtors' Counterclaims against the Trustee and Cross-claims against the Bank of New York, dated September 30, 1993;[3] and

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[2] The Bankruptcy Court docket shows that on June 17, 1993 Debtor Gould filed: (1) a Motion for Leave to Amend Answer in Order to Supplement Counterclaims and Cross-claims, and (2) a Motion to Join Additional Parties as Plaintiffs/Defendants. On June 21, 1993, Debtors Gould and Holywell Corporation filed a Motion for Separate Trial. In its Order denying the Motion to Amend and to Join Additional Parties, the Bankruptcy Court misidentifies *Holywell Corporation* as filing with Mr. Gould the Motion for Leave to Amend and Motion to Join Additional Parties. In its Order denying the Motion for Separate Trial, the Bankruptcy Court does not include *Holywell Corporation* as the movant who together with Mr. Gould filed the Motion for Separate Trial. These errors in identifying the particular moving parties are not considered to materially affect this appeal because Debtors Gould and Holywell Corporation are collectively appealing said two Orders entered by the Bankruptcy Court.

[3] It should be noted that the Bank of New York also filed a Notice of Appeal as to the September 30, 1993 Final Judgment, as well as a November 9, 1993 Order Denying the Bank of New

5. United States Bankruptcy Judge Paul G. Hyman's Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America, dated November 9, 1993.

This Court heard oral argument on this appeal on September 12, 1994, and has carefully considered all briefs submitted on appeal, oral argument of counsel, the entire record, the applicable law and is otherwise fully advised in the premises. For the following reasons, it is **ORDERED AND ADJUDGED** that:

1. United States Bankruptcy Judge Sidney M. Weaver's Order Denying Motion of Defendants Theodore B. Gould and Holywell Corporation to Amend Answer and to Join Additional Parties, dated June 28, 1993, is hereby **AFFIRMED in its entirety**;

2. Judge Weaver's Order Denying Defendant Theodore B. Gould's Motion for Separate Trial, dated June 28, 1993, is hereby **AFFIRMED in its entirety**;

3. Judge Weaver's Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee from Use of Trust Funds to pay Taxes, Etc., dated August 27, 1993, is hereby **AFFIRMED in its entirety**;

York's Motion for Rehearing Clarification or Amendment of Findings and Conclusions on Trustee's Claims, Counterclaims, and Cross-claims. This appeal was designated as Case No. 93-2546-CIV-ARONOVITZ and dismissed by this Court by Order Dismissing Bankruptcy Appeal file dated February 9, 1994.

4. Judge Weaver's Final Judgment on the Debtors' Counterclaims against the Trustee and Cross-claims against the Bank of New York, dated September 30, 1993, is hereby **AFFIRMED in its entirety**; and

5. United States Bankruptcy Judge Paul G. Hyman's Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America, dated November 9, 1993, is hereby **AFFIRMED in its entirety**.

Factual and Procedural Background

Miami Center Limited Partnership borrowed money from the Bank of New York ("Bank") to develop the Miami Center, a hotel and office building complex located in downtown Miami. In August 1984, after it defaulted on the loan, Miami Center Limited Partnership and four affiliated debtors, Theodore B. Gould, Holywell Corporation, Chopin Associates and Miami Center Corporation each filed Chapter 11 petitions. The Bankruptcy Court confirmed the Bank's plan in August 1985.[4] Fred Stanton Smith was appointed Trustee shortly after confirmation. ("Trustee")

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[4] In March 1986, this Court affirmed the Bankruptcy Court's Order confirming the Bank of New York's Plan of Reorganization. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D.Fla. 1986), *appeal dismissed*, 820 F.2d 376 (11th Cir. 1987), *rehearing denied*, 826 F.2d 1010 (11th Cir. 1987), 838 F.2d 1547 (11th Cir. 1988); *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

The plan did not contain a specific provision for the payment of federal income taxes. On October 10, 1985, the effective date of the plan, the Trustee sold the Miami Center to the Bank's nominee for $255.6 million. The purchase price was satisfied by cancellation of the Bank's $242 million mortgage lien, and payment of the balance in cash.

After the sale of the Miami Center, Debtors and their accountant advised the Trustee in writing that the debtors were responsible for any taxes that might be owed. In mid 1987, the Debtors however changed their position and claimed that the Trustee was responsible for the tax consequences of the plan. In late 1987, the Trustee filed an adversary proceeding seeking declaration of the tax obligations of the Trust and, if payment was required, a determination of the Bank's responsibility for these sums.

The Bankruptcy Court, the District Court, and the Court of Appeals all ruled that the Trust had no tax liability. *In re Holywell Corp.*, 85 B.R. 898 (Bankr. S.D. Fla. 1988), *affirmed*, No. 88-0795 slip op. (S.D. Fla. July 30, 1989), *affirmed*, 911 F.2d 1539 (11th Cir. 1990). The U.S. Supreme Court, however, *reversed* and held that the Trustee was required to file tax returns and pay the tax due as a result of consummation of the plan, pursuant to 26 U.S.C. § 6012(b)(3,4). *Holywell Corp. v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992). The Supreme Court further held that United States's failure to object to confirmation of the plan, which said nothing about filing returns or paying taxes, did not preclude the United States from seeking the payment of taxes from the Trustee.

On remand from the Supreme Court, the Trustee filed an amended adversary complaint to pursue claims against the Bank and to determine the amount and priority of tax obligations.[5] Debtors filed counterclaims against Trustee, both individually and as Trustee for breach of fiduciary duty, gross negligence, and conspiracy to injure another in a trade, practice or profession. Debtors also filed cross-claims against the Bank for negligent misrepresentation, fraud in connection with a case under Title 11, and conspiracy to injure another in a trade, practice or profession.

The Trustee's amended complaint and Debtors' counterclaims and cross-claim were set for trial on June 21, 1993. Four days before trial, on June 17, 1993, Debtor Gould filed two motions including: (1) a Motion for Leave to Amend Answer in Order to Supplement its Counterclaims and Cross-claims (Debtor sought to add counts for alleged RICO violations), and (2) a Motion to Join Additional Parties as Plaintiffs/Defendants. On the day of trial, Debtors filed a Motion for a Separate Trial. All three motions were heard the day of trial and denied by the Bankruptcy Court. On June 28, 1993, the Bankruptcy Court entered two Orders denying the three motions. Debtors appeal this ruling.

On the eve of trial, Trustee and United States reached a settlement of the taxes and the Bankruptcy Court later approved that settlement on September 30, 1993. The case

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[5] The Bankruptcy Court found the Bank liable to the Trustee under theories of negligence and indemnity. *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993). The Trustee's claims were set for a separate trial on damages.

proceeded to trial only on Trustee's claims against the Bank (liability only) and on Debtors' counterclaims and cross-claims. On September 30, 1993, the Bankruptcy Court ruled in favor of the Trustee and the Bank on Debtors' counterclaims and cross-claims. Debtors appeal this September 30th Final Judgment.

On June 22, 1993 (the last day of trial) the Bankruptcy Court entered an Order Denying Debtor Gould's Motion to Enjoin Trustee from Use of Trust Funds to Pay Taxes. Debtors moved for a rehearing of this June 22, 1993 Order and the Bankruptcy Court denied Debtors' Motion for Rehearing on August 27, 1993. Debtors appeal this August 27th denial of rehearing.

After the Bankruptcy Court approved the settlement between Trustee and United States by Order dated September 30, 1993, Debtor Gould filed a Motion for Rehearing of this Order. On November 9, 1993, the Bankruptcy Court denied this Motion for Rehearing. Debtors appeal this November 9th denial of rehearing.

Standard of Review

In accordance with Federal Rule of Bankruptcy Procedure 8013, the Bankruptcy Court's findings of fact will not be set aside unless clearly erroneous. *In re Chase & Sanborn Corp.*, 904 F.2d 588 (11th Cir. 1990); *In re T&B General Contracting, Inc.*, 833 F.2d 1455 (11th Cir. 1987). Equitable determinations by the Bankruptcy Court are subject to review under an abuse of discretion standard. *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 833 (11th Cir. 1990). Conclusions of law are subject to *de novo*

review. *In re Chase & Sanborn Corp.*, 904 F.2d at 593; *In re Sublett*, 895 F.2d 1381 (11th Cir. 1990).

While the Bankruptcy Court's factual findings are subject to a clearly erroneous standard, that standard does not apply when determining the propriety of the Bankruptcy Judge's conclusions of law, (i.e.) determination of what law applies or determination of the ultimate legal conclusions resulting from the application of the law to the facts. Legal conclusions made by the Bankruptcy Judge may not be approved by the District Court without an independent determination. *In re Columbia Data Products, Inc.*, 99 B.R. 682, 684 (D.Md. 1989), *affirmed*, 892 F.2d 26 (4th Cir. 1989); *citing, In re Hunter Sav. Ass'n.*, 34 B.R. 368, 374 (Bankr.S.D.Ohio 1983), *reversed on other grounds*, 750 F.2d 536 (6th Cir. 1984); *In re Hollock*, 1 B.R. 212, 215 (Bankr.M.D.Pa. 1979).

Appellant Debtors' Arguments on Appeal

Debtors argue that the Bankruptcy Court lacked subject matter jurisdiction to enter the September 30, 1993 Final Judgment denying Debtors' counterclaims against Trustee and denying Debtors' cross-claims against the Bank. Debtors contend that the counterclaims (alleging negligence, conspiracy and breach of fiduciary duty) are not core matters that are referable to the Bankruptcy Judge without consent.

Debtors argue that the Bankruptcy Court abused its discretion when it denied Debtor Gould's Motion for Leave to Amend its Answer to add counts alleging racketeering. Debtors contend that evidence discovered

during depositions warranted amendment of their counterclaims and cross-claims.

Debtors argue that the Bankruptcy Court abused its discretion by denying Debtors' Motion for Separate Trial and by denying Debtor Gould's Motion to Join Additional Parties. Debtors argue that the denial to join additional parties violated Rule 19, Fed.R.Civ.P. which provides for joinder of persons needed for just adjudication. Moreover, Debtors argue that the Order denying joinder of the Bank's attorneys as cross-defendants and Trustee's accountants as counterdefendants, as well as the denial of the motion for separate trial precluded a fair trial on the issues.

Debtors claim that Judge Weaver's September 30th Final Judgment is not in conformity with the Supreme Court's decision in *Holywell Corp. v. Smith, supra.* Moreover, Debtors argue that the Bankruptcy Court erred in denying the Motion to Enjoin Trustee from using the Trust's funds to pay the taxes. Debtors argue that the Trust's funds used to pay the corporate income taxes attributable Holywell Corporation and Miami Center Corporation were assets of Gould's individual estate and that the property of one's estate cannot be used to pay taxes assessed against another taxpayer. Debtors argue that Trustee is personally liable for the taxes under 31 U.S.C. § 3713(b).[5] Finally, Debtors claim that the

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[5] 31 U.S.C. § 3713(b) provides:

> A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims to the Government.

Bankruptcy Court abused its discretion in denying Debtors' Motion to Modify the Settlement between Trustee and United States.

In summary, Appellee Debtors argue that all Orders on appeal to this court and described herein should be reversed.

Appellee Trustee's Arguments on Appeal

In rebuttal, Appellee Trustee argues that it is beyond dispute that the Bankruptcy Court had jurisdiction over the amended complaint and Debtors' counterclaims and cross-claims. Trustee asserts that on remand from the Supreme Court, the amended complaint sought declaratory relief against the federal government in order to determine the priority and amount of the trust's tax obligations imposed by the Supreme Court. Debtors were named in the amended complaint as interested parties and no affirmative relief was sought against them.

Trustee argues the Debtors voluntarily submitted to the jurisdiction of the court by filing counterclaims against the Trustee and cross-claims against the Bank. Trustee contends that Debtors were not legally compelled to assert their claims as the counterclaims were not compulsory under Rule 13(a), Fed.R.Civ.P.

Trustee further argues that Debtors have waived any right to contest jurisdiction because Debtors specifically admitted in their answer and counterclaim that the Court

had jurisdiction.[6] Moreover, the confirmed plan grants the Bankruptcy Court jurisdiction post-confirmation to enter any order necessary or appropriate for the administration of proceedings.

Trustee argues that the Bankruptcy Court properly denied (a) Debtor's Motion to Amend the Counterclaims and Cross-claims, (b) Debtor's Motion to Join Additional Parties, and (c) Debtors' Motion for Separate Trial, as all three motions were untimely. The Motion to Amend and Motion to Join Additional Parties were filed 4 days before trial and the Motion for Separate trial was filed on the day of trial. Trustee asserts that these motions would have dramatically affected the scheduled trial. Trustee argues that the Motion for Separate Trial was essentially a motion for continuance and the Bankruptcy Court properly denied all three motions.

Trustee argues that the Bankruptcy Court did not err in its September 30, 1993 Findings of Fact and Conclusions of Law. In particular, Trustee argues that Debtors failed to prove gross negligence, breach of fiduciary duty and conspiracy. Also, the Bankruptcy Court found that the issues in Debtors' counterclaims and cross-claims had been raised before and that the doctrines of *res judicata* and collateral estoppel bar relitigation.

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[6] Debtors admitted in their answer at ¶ 1 that the "Court does have postconfirmation jurisdiction to exercise supervisory control over the Trustee as an officer of this court." Debtors also alleged in their counterclaim at ¶ 57 that the Bankruptcy Court had the requisite jurisdiction. Court Paper #66.

Trustee argues that the motion to enjoin the use of Monies to Pay Taxes was properly denied by the Bankruptcy Court. Trustee claims that Debtors are estopped from arguing that the assets of the Trust are not available to pay the tax obligations because Debtors argued to the Supreme Court in their Application to Stay Mandate of the Eleventh Circuit's tax decision that: "As we demonstrate below, the statute [26 U.S.C. § 6012(b)] requires resort to the trust fund."

Moreover, Trustee argues the Supreme Court's decision was limited to the Trustee's obligation to file returns and pay taxes. It did not hold the Trustee personally liable for the taxes and 31 U.S.C. § 3713 does not apply to impose such liability in this case. Trustee notes that 31 U.S.C. § 3713(a)(2) expressly states that it is not applicable to "a case under title 11." Lastly, Trustee argues that there is no evidence that the funds remaining in the Trust are traceable to Gould's bankruptcy estate, as opposed to the estates of his co-debtors.

Appellee Bank's Arguments on Appeal

Appellee Bank's arguments are in accord with Trustee's arguments. Bank adds that the Bankruptcy Court clearly has subject matter jurisdiction because 11 U.S.C. § 505(a) expressly permits a bankruptcy court to "determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed . . . " Bank further argues that 28 U.S.C. § 157(b)(2)(A) provides that "matters concerning the administration of the estate" are "core" bankruptcy matters and § 157(b)(2)(O) characterizes a

proceeding "affecting the liquidation of the assets of the estate" as a "core" matter. Bank contends that the Bankruptcy Court accordingly had subject matter jurisdiction over Trustee's adversary proceeding.

Bank argues that the Bankruptcy Court's September 30, 1993 Judgment, Findings and Conclusions are correct and are based upon duly-admitted evidence and applicable case law. Bank claims that Debtors have not shown the Court's findings to be clearly erroneous. Bank argues that the Bankruptcy Court properly denied Gould's Motion to Enjoin Trustee from using Trust Funds to pay the taxes. The Trustee, the United States and the Bank all opposed Gould's motion for injunction. Bank argues that in his motion and at hearing, Gould did not prove any of the essential elements for injunctive relief and the Bankruptcy Court properly denied the motion.

Finally, Bank argues that after devoting two evidentiary hearings to the IRS settlement, the settlement was properly approved by the Bankruptcy Court. Bank states that there was no abuse of discretion by the Bankruptcy Court in approving the settlement.

United States' Amicus Brief

United States as an interested party in this matter argues that the Bankruptcy Court correctly approved the settlement of federal tax liabilities reached between Trustee and United States. In the settlement, Trustee paid to the United States $10 million in taxes, in addition to amounts previously paid (approximately $3,327,229).

Since the Supreme Court held that Trustee was responsible for the payment of the tax liabilities, Trustee's payment from the Trust fund was proper as the plan gave Trustee all title, right and interest to the trust property. United States argues that Debtors are estopped from arguing that Trustee cannot use the funds in his possession to pay the taxes since Debtors already argued that Trustee was the only one able to pay the taxes. United States asserts that Debtors' challenge to the tax settlement should be rejected.

In summary, Appellees Trustee and Bank argue that all Orders on appeal to this Court and described herein should be affirmed. Moreover, United States argues that this court should reject Debtors' challenge to the settlement between the Trustee and United States.

Discussion

Bankruptcy Court's Orders (a) Denying Motion of Defendants Theodore B. Gould and Holywell Corporation to Amend Answer and to Join Additional Parties, and (b) Denying Defendant Theodore B. Gould's Motion for Separate Trial, both Orders dated June 28, 1993

Upon careful consideration of the arguments made by the parties and a review of the entire record, including all briefs submitted by the parties, Debtors have not demonstrated to this Court that the Bankruptcy Court abused its discretion or erred as matter of law in denying Debtors' three motions. *Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 39 F.3d 292, 297 (11th Cir. 1994) (the appellate court's standard of review is abuse of discretion as to a district court's denial of a motion to amend a

complaint); *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1346 (6th Cir. 1993) (the appellate court reviews a Rule 19(a) finding that a party is necessary to an action under an abuse of discretion standard, whereas a Rule 19(b) determination that a party is indispensable to an action is reviewable *de novo*).

Debtor Gould's Motion for Leave to Amend answer and Motion to Join additional Parties were filed 4 days before trial. Debtors' Motion for separate trial was filed the day of trial. The Bankruptcy Court asked Mr. Gould at trial "why were the amendments filed so late." (6/21/93 Trial transcript, p. 20) The Bankruptcy Court, obviously concerned with the timeliness of Debtor's Motions to Amend and to Join Additional Parties, denied them. As to the Motion for Separate Trial, the Court denied it without comment. (6/21/93 Trial Transcript, p. 22)

Bankruptcy Rule 7015 governs amendments in an adversary proceeding. Said rule incorporates Rule 15, Fed.R.Civ.P. which provides that leave to amend "shall be freely given when justice so requires." However, a trial court may deny a motion for leave to amend if permitting an amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990), *citing*, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). This court finds no justice in allowing Debtors to add racketeering claims and nine more parties on the eve of trial considering the long established history of this case before the Bankruptcy Court, this Court, other District Courts in the Southern District of Florida, the Eleventh Circuit and the United States Supreme Court. To permit amendment at

this late stage would indeed prejudice the opposing parties in this case. Likewise, Debtors have not shown to this Court that the Bankruptcy Court erred in denying Debtors' Motion for Separate Trial.

Bankruptcy Court's Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee from Use of Trust Funds to Pay Taxes, etc., dated August 27, 1993

Debtors' have not shown to this Court that the Bankruptcy Court abused its discretion in denying their Motion for Rehearing of the June 22, 1993 Order. *Davis v. Wal-Mart Stores, Inc.*, 967 F.2d 1563, 1566 (11th Cir. 1992) (the standard of review for a district court's disposition of a motion for new trial is abuse of discretion). Moreover, Debtors are estopped from arguing that the tax obligation cannot be paid from the Trust funds because Debtors argued to the Supreme Court in their Application to Stay Mandate of the Eleventh Circuit's tax decision that: "As we demonstrate below, the statute [26 U.S.C. § 6012(b)] requires resort to the trust fund."

This Court finds that the Supreme Court's decision in *Holywell Corp. v. Smith, supra,* does not impose personal liability on the Trustee to pay the taxes and, as the Bankruptcy Court properly found, 31 U.S.C. § 3713[7] does

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[7] 31 U.S.C. § 3713 governing priority of Government claims provides in relevant part:

(a)(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the

not apply in this title 11 case. Specifically, the Bankruptcy Court held:

> Initially, it is clear that § 3713 is not applicable to cases under title 11. *See* 31 U.S.C. § 3713(a)(2) . . . The Court concludes the Trustee is not liable to the debtors pursuant to the doctrine of derived judicial immunity. Final Judgment dated 9/30/93, p. 18.

Therefore, the Bankruptcy Court did not abuse its discretion in denying Debtors' Motion for Rehearing of the June 22, 1993 Order.

Bankruptcy Court's Final Judgment, Findings of Fact and Conclusions of Law on the Debtors' Counterclaims against the Trustee and Cross-claims against the Bank of New York, dated September 30, 1993

The Bankruptcy Court held a trial on these claims on June 21-22, 1993. On September 30, 1993, the Bankruptcy Court ruled in favor of the Trustee and the Bank on Debtors' counterclaims and cross-claims. This Court finds that the Bankruptcy Court had subject matter jurisdiction over Debtors' counterclaims and cross-claims pursuant to 11 U.S.C. § 505(A), 28 U.S.C. § 157(b)(2)(A) and

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person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims to the Government. (emphasis added)

§ 157(b)(2)(O).[8] Also, subject matter jurisdiction is proper due to the original posture of this case and its subsequent remand from the Supreme Court. The salient findings made by Bankruptcy Court with regard to Debtors' counterclaims and cross-claims are set forth below.

As to Debtors' counterclaim of gross negligence against Trustee, the Bankruptcy Court found that Trustee's "conduct reflects a high degree of care and a proper and reasonable response to a highly unusual and difficult problem." September 30, 1993, Findings of Fact and Conclusions of Law, p. 10.

As to Debtors' counterclaim of breach of fiduciary duty against Trustee, the Bankruptcy Court found that Debtors failed to demonstrate any breach of fiduciary duty, stating that "Trustee complied with each court order governing the tax issues [and] [u]pon the trust being required to file returns and pay taxes, the Trustee did so." September 30, 1993, Findings of Fact and Conclusions of Law, p. 12.

As to Debtors' counterclaim of conspiracy against Trustee, the Bankruptcy Court found that Debtors established no conspiracy between Trustee and the Bank. The Bankruptcy Court found that the only evidence of any

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[8] 11 U.S.C. § 505(a) provides in relevant part:

> "the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed"

28 U.S.C. § 157(b)(2)(A) provides that "matters concerning the administration of the estate" are "core" bankruptcy matters and § 157(b)(2)(O) characterizes a proceeding "affecting the liquidation of the assets of the estate" as a "core" matter.

alleged conspiracy was an indemnity letter between Trustee and Bank, and that the letter by itself was insufficient to prove any "agreement to either accomplish an unlawful purpose or accomplish some purpose not in itself unlawful but by unlawful means." September 30, 1993, Findings of Fact and Conclusions of Law, p. 12.

The Bankruptcy Court further found that the Debtors were estopped and otherwise waived their right to assert these claims due to their prior conduct in this case. The Court found that the Debtors "engaged in inequitable conduct which precludes any recovery against the Trustee, either individually or in his capacity as Trustee." September 30, 1993, Findings of Fact and Conclusions of Law, p. 18.

As to Debtors' cross-claims of negligent misrepresentation and fraud against Bank, the Bankruptcy Court found that Debtors failed to prove such claims. As to Debtors' cross-claim of conspiracy against Bank, the Court held that "debtors failed to present any evidence at trial of a conspiracy by the bank or any of its representatives to injure the debtors' trade, practice, profession or business." September 30, 1993, Findings of Fact and Conclusions of Law, p. 23. Finally, the Bankruptcy Court added as an additional reason for dismissing Debtor Holywell's cross-claims and counterclaims was that no attorney appeared for Holywell Corporation at the trial.

Upon careful review of the arguments presented, the entire record and applicable law, Debtors have not shown that the Bankruptcy Court's factual findings are clearly erroneous. Moreover, a *de novo* review of the Court's legal conclusions shows no error with regard to the September

30, 1993 Final Judgment. Said Final Judgment is in conformity with the Supreme Court's decision in *Holywell Corp. v. Smith, supra.* That decision held that the Trustee had to file returns and pay taxes on income attributable to Debtors' property. The Supreme Court never stated that the Trustee was "personally liable" for the tax. Rather, it said that the Trustee had to pay taxes which means the Trustee, in his capacity as trustee. On remand, a settlement was reached between Trustee and United States to pay those taxes out of the Trust. This is consistent with the confirmed plan which provided that "all costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property." The tax settlement was confirmed by the Bankruptcy Court. The matters which have transpired after remand are consistent with and conform to the Supreme Court's *Holywell* decision. Accordingly, the September 30, 1993 Final Judgment should be **AFFIRMED.**

Bankruptcy Court's Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America, dated November 9, 1993

Again, Debtors' have not shown that the Bankruptcy Court abused its discretion in denying Gould's Motion for Rehearing of Order Approving Stipulation. *Davis v. Wal-Mart Stores, Inc., supra.* While Debtors make the statement in their brief that the Bankruptcy Court abused its

discretion, Debtors have failed to show how the Bankruptcy Court abused its discretion. Accordingly, the November 9, 1993 [sic] should be **AFFIRMED.**

In summary and for the reasons set forth herein, it is **ORDERED AND ADJUDGED** that:

1. United States Bankruptcy Judge Sidney M. Weaver's Order Denying Motion of Defendants Theodore B. Gould and Holywell Corporation to Amend Answer and to Join Additional Parties, dated June 28, 1993, is hereby **AFFIRMED in its entirety;**

2. Judge Weaver's Order Denying Defendant Theodore B. Gould's Motion for Separate Trial, dated June 28, 1993, is hereby **AFFIRMED in its entirety;**

3. Judge Weaver's Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee from Use of Trust Funds to Pay Taxes, Etc., dated August 27, 1993, is hereby **AFFIRMED in its entirety;**

4. Judge Weaver's Final Judgment on the Debtors' Counterclaims against the Trustee and Cross-claims against the Bank of New York, dated September 30, 1993, is hereby **AFFIRMED in its entirety;** and

5. United States Bankruptcy Judge Paul G. Hyman's Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulation and Joint Motion for approval of Compromise and Settlement of Claims of the United States of America, dated November 9, 1993, is hereby **AFFIRMED in its entirety.**

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of January, 1995.

/s/ Sidney M. Aronovitz
Sidney M. Aronovitz
UNITED STATES
DISTRICT JUDGE

copies provided:

The Honorable Norman C. Roettger, Chief Judge
The Honorable Sidney M. Weaver
The Honorable Paul G. Hyman
The Honorable Lenore C. Nesbitt
The Honorable Edward B. Davis
The Honorable Stanley Marcus
The Honorable William J. Zloch
Robert M. Musselman, Esq.
Theodore B. Gould, Pro Se
Herbert Stettin, Esq.
Jose F. DeLeon, Esq.
Vance E. Salter, Esq.
Fred Stanton Smith, Trustee
Clerk, U.S. Bankruptcy Court
The Honorable James Lawrence King
The Honorable William M. Hoeveler
The Honorable A. Jay Cristol
The Honorable Robert A. Mark
The Honorable Raymond B. Ray
The Honorable Steven H. Friedman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-1540-CIV-NESBITT

BKC Nos. 84-01590 through
84-01594-BKC-PGH

IN RE:

HOLYWELL CORPORATION, et al.,

Debtors.

_____/

HOLYWELL CORPORATION
and THEODORE B. GOULD,

Appellants,

(Filed Jul. 07, 1997)

vs.

THE BANK OF NEW YORK and
FRED STANTON SMITH, as Trustee,

Appellees.

_____/

ORDER AFFIRMING BANKRUPTCY COURT'S ORDER GRANTING JOINT MOTION FOR APPROVAL OF SETTLEMENT OF TRUSTEE'S CLAIMS REGARDING INCOME TAXES AND RELATED EXPENSES

THIS APPEAL from the bankruptcy court concerns the **Order Granting Joint Motion for Approval of Settlement of Trustee's Claims Regarding Income Taxes and Related Expenses**, entered on June 22, 1994.

The parties to the settlement are the Trustee, Fred Stanton Smith, and the Bank of New York. The amount of damages awarded by the bankruptcy court to the Trustee is $15 million. In this appeal the former Chapter 11 debtors challenge the bankruptcy court's approval of the settlement.

DISCUSSION OF ISSUES RAISED BY APPELLANTS

1. Jurisdiction of the Bankruptcy Court to Enter Order

Appellants contend that this is not a "core proceeding" under the jurisdictional authority of 28 U.S.C. § 157(a). Appellants rely on the principles of *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), and assert that the order approving the settlement must be entered by an Article III judge, as the matter of the settlement is not a resolution of debtor creditor rights.

The Court finds no merit in Appellants' argument that the appealed order of the bankruptcy court concerns issues of state-created rights. The issues of the settlement are directly related to the Trustee's duties of administration pursuant to the Chapter 11 plan. *See* 28 U.S.C. § 157(b) (2) (A) and (b) (2) (O).

2. Amount of Damages Awarded through Settlement

The basis for the debtors' arguments on the issue of damages is their submission of a financial analysis of the losses sustained by the debtors through the Trustee's

actions in carrying out the plan. Appellants' arguments raise issues of tax law and aspects of the reorganization plan to contend that the amount of the settlement falls short of fully compensating the Trustee for losses sustained by the debtors to whom duties are owed. According to Appellants' theory, the debtors, as the residual beneficiaries of the Trust, assert the financial impact of the plan's provisions as the elements of their total damages.

Because this is a matter reviewed under the standard of whether the bankruptcy court abused its discretion in approving the settlement, Appellees assert that the factor of the reasonableness of the settlement is paramount. *See In re Teletronics Services, Inc.*, 762 F.2d 185, 189 (2d Cir. 1985).

Based on the information presented to the bankruptcy court concerning the impact of the settlement and its relation to the matter of the Trustee's Certificate, there was no abuse of discretion in granting approval for the bank's liability to be set at the amount of $15 million for indemnification of the Trustee, and in denying punitive damages. The litigation, including possible appeals, averted by the settlement between the Trustee and the Bank of New York is a significant factor. The amounts for the settlement for nondisclosure of the plan's tax consequences and the Trustee's Certificate issue are set off for a net recovery by the bank.

3. Ripeness for Review

The Court finds no merit in Appellants' argument that this matter is not ripe for appellate review due to the

interdependence of this appeal with other pending appeals on related issues. The debtors have not prevailed in their appeals concerning the related issues that strike at the heart of the plan, where no relief may be granted to undo what has been performed by the Trustee in accordance with the plan's provisions and the decisions rendered to interpret and enforce those provisions. *See Holywell v. Bank of New York*, No. 95-5351 (11th Cir. Apr. 30, 1997). The Trustee has reached a settlement with the government concerning the amount of federal taxes owed, and the settlement with the Bank of New York reflects a reasonable resolution of the issues.

CONCLUSION

The Court has thoroughly reviewed the record, and finds that the bankruptcy court had jurisdiction over the issue of the settlement, and that the bankruptcy court did not abuse its discretion in approving the settlement between the Trustee and the Bank of New York. The Court finds no merit in the debtors' position in this Cause, and in the debtors' continuing challenges to matters of the confirmed plan and the subsequent resolution of issues pertaining to the plan and the Trustee's duties, of which this appeal is another example. Accordingly, it is

ORDERED AND ADJUDGED that the Order Granting Joint Motion for Approval of the Settlement of Trustee's Claims regarding Income Taxes and Related Expenses, entered by the bankruptcy court on June 22, 1994, is hereby **AFFIRMED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 7 day of July, 1997.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

In re: Holywell Corporation Debtors. _____/	Case Nos. 84-01590/94-BKC-PGH
FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST, Plaintiff, vs. THE BANK OF NEW YORK, *et al.*, Defendants. _____/	Adv. No. 87-0627-PGH-A

THE BANK OF NEW YORK,

Plaintiff,

vs.

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST, *et al.*,

Defendants,

_____/

Adv. No. 94-0014-PGH-A

ORDER GRANTING JOINT MOTION FOR APPROVAL OF SETTLEMENT OF TRUSTEE'S CLAIMS REGARDING INCOME TAXES AND RELATED EXPENSES

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THIS MATTER having come before the Court on the 22nd day of June, 1994 on the Joint Motion for Approval of Settlement of Trustee's Claims regarding Income Taxes and Related Expenses (the "Joint Motion") filed by Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("Trust"), and The Bank of New York ("Bank"), and the Court having considered the motion, the Debtors' objections to the settlement, and the pleadings on file, and having considered the argument of the parties and the evidence, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED:

1. The Trustee and the Bank have filed a Joint Motion for Approval of Settlement of Trustee's Claims Regarding Income Taxes and Related Expenses. They seek to settle both adversary no. 87-0627 and adversary no. 94-0014.

2. This Court has jurisdiction to consider the motion pursuant to Article XIV of the plan of reorganization,

Bankruptcy Rules 2002 and 9019, and Bankruptcy Code §§ 1141 and 1142.

3. The Court finds that the proposed settlement is in the best interests of the parties, is fair and reasonable, and should be approved.

4. As to the Trustee's damage claims against the Bank in adversary no. 87-0627, the settlement sum of $15 million payable by the Bank, is approximately 77% of the sum the Trustee could hope to recover assuming a best case scenario in which the Trustee prevailed on each element of his claimed damages. The Court has considered the Trustee's damage claims and the evidence of the attendant risks and finds that the compromise is reasonable.

5. As to adversary no. 94-0014, the Trustee has agreed under the settlement not to appeal this Court's March 9, 1994 Final Judgment, as amended by the Court's March 31, 1994 order on rehearing, in return for the $15 million consent judgment set forth above. This consent judgment is to be set off against the sums due the Bank under the Final Judgment in adversary no. 94-0014. The Court finds that it is reasonable for the Trustee to forego an appeal of adversary no. 94-0014 for all of the reasons set forth in the Final Judgment in favor of the Bank in that case. As the Bank would be entitled to set off whatever award of damages is entered in adversary no. 87-0627 as a matter of law, the set off feature of the proposed compromise is also reasonable.

6. The remaining terms of the parties' settlement are the result of lengthy negotiations. The Court has reviewed these terms and the evidence in support thereof

and finds that the remainder of the compromise is also reasonable. The compromise preserves the Debtors' right to offer evidence of alleged separate damages to the Trust in adversary no. 87-0627, to the extent the Debtors have standing to do so. The settlement also preserves the Trust's right to assert certain damages (other than damages relating to income tax issues set forth in ¶ 6 of the Joint Motion) should any such damages be incurred in the future. The compromise also permits the settlement to be vacated and the parties to be restored to their respective positions, *status quo ante*, if certain matters currently on appeal are reversed. Those matters are specifically identified in the Joint Motion. This provision of the settlement does not adversely affect the Trustee.

7. The Debtors have objected to the settlement on a number of grounds. Their concern, in a nutshell, is that the settlement sum is too low and that the Bank is not paying any punitive damages. As noted previously, the settlement sum is approximately 77% of the Trustee's claimed damages. The Debtors wish the Trustee to seek damages against the Bank for alleged wrongs that have already been adjudicated adversely to the Debtors.[1] As to the claim for punitive damages, the Court notes that (a) the Trustee did not seek such damages in his pleadings on the counts for negligent misrepresentation and indemnification, and (b) the Trustee would not likely be entitled to punitive damages as a matter of law under the facts of

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[1] Two examples are the Debtors' demand that the Trustee recover the alleged "super-priority loans" and the alleged overcharge of interest on the mortgage debt. This Court will not reconsider such issues.

this case, as set forth in the judgment of liability against the Bank. *See Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993).[2] The balance of the Debtors' objections are entirely without merit.

8. The Court has considered all of the relevant facts and finds that the proposed settlement does not fall below the "lowest point in the range of reasonableness." *In re Teltronics Services, Inc.*, 762 F.2d 185, 189 (2d Cir. 1985); *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983). Settlement of the two adversaries will save years of appeals, and avoid further delay and expense in this ten year old proceeding. Compared with the myriad of possibilities in the appellate process could bring, the terms of the compromise are reasonable. As the Fifth Circuit Court of Appeals has held in such circumstances,

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to

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[2] Only conduct that is willful or malicious such that it is tantamount to criminal misconduct warrants the imposition of punitive damages. *See White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1028-29 (Fla. 1984); *Carraway v. Revell*, 116 So. 2d 16, 20 n.12 (Fla. 1959); *W.R. Grace Co. v. Waters* 19 F.L.W. S286 (Fla. June 3, 1994).

> encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success of failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise.

Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960). The Court has been so apprised and concludes that the compromise should be approved.

8. The Joint Motion for approval of Settlement of trustee's Claims Regarding Income Taxes and Related Expenses is granted. The parties are directed to execute forthwith all documents necessary to effectuate the terms of the agreement.

DONE AND ORDERED this 22nd day of June, 1994, at Miami, Dade County, Florida.

/s/ Paul G. Hyman
PAUL G. HYMAN
UNITED STATES
BANKRUPTCY COURT
JUDGE

Conformed copy furnished to:

Herbert Stettin, Esquire, who
upon receipt shall distribute
a conformed copy of this order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,	Case Nos. 84-01590-BKC-SMW 84-01591-BKC-SMW 84-01592-BKC-SMW 84-01593-BKC-SMW 84-01594-BKC-SMW
Plaintiff,	
vs.	
THE BANK OF NEW YORK, UNITED STATES OF AMERICA, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, THEODORE B. GOULD, and MIAMI CENTER CORPORATION,	Adversary No. 87-0627-BKC-SMW-A
Defendants.	

_____/

FINAL JUDGMENT ON THE DEBTORS' COUNTERCLAIMS AGAINST THE TRUSTEE AND CROSS-CLAIMS AGAINST THE BANK OF NEW YORK

THIS CAUSE came before the Court on June 21-22, 1993 on debtors Theodore B. Gould and Holywell Corporation's counterclaims against Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust, and cross-claims against The Bank of New York. In conformity with the Findings of Fact and Conclusions of

Law on the Debtors' Counterclaims Against the Trustee and Cross-claims Against The Bank of New York of even date, it is hereby

ORDERED AND ADJUDGED that final judgment is entered in favor of Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust, on these debtors' counterclaims in this adversary proceeding; and that final judgment is entered in favor of The Bank of New York on these debtors' cross-claims in this adversary proceeding.

DONE AND ORDERED at Miami, Dade County, Florida, this 30 day of September, 1993.

SIDNEY M. WEAVER
SIDNEY M. WEAVER
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT

Conformed copies provided to Herbert Stettin for distribution to all counsel of record and interested parties.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE BANK OF NEW YORK, UNITED STATES OF AMERICA, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, THEODORE B. GOULD, and MIAMI CENTER CORPORATION,

Defendants.
_____/

Case Nos.
84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adversary No.
87-0627-BKC-SMW-A

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DEBTORS' COUNTERCLAIMS AGAINST THE TRUSTEE AND CROSS-CLAIMS AGAINST THE BANK OF NEW YORK

This cause came before the court on June 21-22, 1993 on debtors Theodore B. Gould and Holywell Corp.'s counterclaims against Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust ("Trustee"), and cross-claims against The Bank of New York, and the court having heard and considered the testimony and argument of counsel, having reviewed and

considered the evidence and the pleadings, and being otherwise fully advised in the premises, the court makes the following findings of fact and conclusions of law.

FACTS

The debtors[1] filed simultaneous voluntary Chapter 11 petitions on August 22, 1984. On August 8, 1985, the court confirmed a plan of reorganization proposed by The Bank of New York ("bank"). *See Bank of New York v. Holywell*, 59 B.R. 340 (S.D. Fla. 1986), *dismissed as moot sub nom., Miami Center Ltd. Ptnshp. v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

The plan's primary features included:

- substantive consolidation of the debtors' assets
- the creation of the Miami Center Liquidating Trust, containing all of the debtors' § 541(a) assets, and the appointment of a trustee to administer the Trust
- the sale of the Miami Center by the Trust to the bank for $255.6 million
- subordination of the debtors' claims

The debtors' assets included but were not limited to the Miami Center property, the proceeds from the pre-confirmation sale of what is commonly referred to as the

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[1] The debtors are Theodore B. Gould and four companies he owns, controls and dominates: Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership, and Chopin Associates. Only debtors Gould and Holywell filed the counter- and cross-claims at issue.

Washington properties, and various stock and partnership interests.

The bank failed to include a tax analysis or disclose the plan's tax consequences in its disclosure statements, and the plan itself makes no mention of or provision for payment of taxes. *See* 11 U.S.C. § 1129(d). Nonetheless, neither the federal nor state tax authorities objected to the plan, and the debtors' objections and appeal from the confirmation order were unsuccessful. *See Holywell v. Bank of New York, supra.* In 1985, prior to Mr. Smith's appointment as Trustee, this court invited the debtors to present evidence of the claimed adverse tax consquences, and offered to consider modification of the plan upon the presentation of such proof. C.P. 534. The debtors ignored this offer, and never presented any evidence of the tax obligations or sought modification of the plan proposed by the bank.

Mr. Smith was appointed Trustee of the Miami Center Liquidating Trust on August 12, 1985. C.P. 916. Until then, he was not a party to the bankruptcy proceedings. He played no role in the formulation or confirmation of the plan.

On October 10, 1985, the effective date of the plan, the Trustee conveyed the Miami Center to the bank for $255.6 million in accordance with the terms and conditions of the plan. The bank's nominee paid the purchase price by crediting the amount of the mortgage obligation against the purchase price, including post-confirmation

interest[2] and by taking other closing credits and prorations and by paying the balance in cash.

The Trustee did not establish a reserve for taxes due on the pre-confirmation sale of the Washington properties or the post-confirmation sale of the Miami Center. The plan simply did not provide for income taxes.

At the closing, the Trustee demanded from the bank an indemnity agreement. The bank prepared an agreement dated October 10, 1985, in which it undertook to indemnify the Trustee "for any claims against said Liquidating Trustee, as a result of execution of the Contract [of sale of the Miami Center] in the manner set forth in the above-quoted provisions or any other provision of the plan." Plainly, this language was for the purpose of holding the Trustee harmless from all of the effects of consummation of the plan, including any tax consequences. At trial, the trustee testified he intended the language to be as broad as necessary to include all potential claims.

After the sale, the debtors and their accountant repeatedly advised the Trustee in writing that the debtors were responsible for any taxes that might be owed. The Trustee's former counsel also advised the Trustee that the Trust had no tax responsibility.

By mid-1987, however, the debtors asserted that the Trust was responsible for the payment of federal taxes. The Internal revenue Service also began to inquire about

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[2] The Debtors complain that the Trustee wrongfully permitted the bank to receive credit of $27 million for post-petition interest. Their prior challenge to this credit failed. *See In re Holywell*, No. 88-151 slip op. (S.D. Fla. July 21, 1988).

tax returns. In order to determine his responsibilities, the Trustee filed the instant adversary proceeding against the United States, the debtors and the bank for declaratory relief of the question of the Trust's tax liability and a determination of the bank's responsibility for any taxes the Trust might owe. This court ruled the Trust had no tax obligations and, therefore, did not reach the Trustee's claims against the bank. *Smith v. United States*, 85 B.R. 898 (Bankr. S.D. Fla. 1988). The district court affirmed, as did the court of appeals. *United States v. Smith*, No. 88-0795 slip op. (S.D. Fla. July 30, 1989), *aff'd*, 911 F.2d 1539 (11th Cir. 1990). The Supreme Court of the United States, however, reversed. *Holywell v. Smith*, 502 S.Ct. 1021 (1992). The Supreme Court held the Trustee had to file tax returns and pay the tax consequences of the confirmed plan, pursuant to the requirements of § 6012(b)(3) and (4) of the Internal Revenue Code, despite the failure of the plan to provide for income taxes.

There was no determination in that proceeding of the personal liability of the Trustee for the taxes or the bank's liability. The opinion addressed only Mr. Smith's responsibilities as Trustee of the Miami Center Liquidating Trust. *Id.*

Upon remand, the Trustee amended his adversary complaint to pursue claims against the bank and to determine the amount and priority of taxes due the United States. Debtors Gould and Holywell filed counterclaims against Mr. Smith, both individually and as Trustee, for breach of fiduciary duties owed the debtors, for gross negligence, and for conspiracy to injure another in a trade, practice or profession for having failed to file tax returns and pay the taxes due. These debtors also filed

cross-claims against the bank for negligent misrepresentation, fraud in connection with a case under title 11, and conspiracy to injure another in a trade, practice or profession.

These counterclaims and cross-claims are not the first time such allegations have been made against the Trustee, individually and as Trustee, and against the bank. The debtors unsuccessfully sued Mr. Smith and the bank for, *inter alia,* failing to establish reserves for taxes. *In re Holywell,* 93 B.R. 780 (S.D. Fla. 1988). They also caused four of Holywell's subsidiaries to sue Mr. Smith and the bank in Virginia for, *inter alia,* his handling of the tax issues. These cases were each dismissed. *See, e.g., Twin Development Corp. v. Smith,* No. 87-0037C slip op. (W.D. Va. Nov. 15, 1988). And, shortly after the Supreme Court's tax decision, the debtors moved for Mr. Smith's discharge as Trustee for his handling of the tax issues. C.P. 2331. That motion was denied without prejudice, at Mr. Gould's suggestion. *See* Sept. 11, 1992 Transcript at pp. 37-38.

The debtors' counterclaims and cross-claims were tried before the court on June 21-22, 1993. Mr. Gould appeared *pro se,* and no counsel appeared for Holywell.

At trial, the Trustee testified that he demanded indemnification from the bank before implementing the plan because he knew there could be "all kinds of ramifications, none of which I could examine or be familiar with or know much about right then and there." He stated that he had "no idea whether there would be tax issues." There was undisputed testimony that the Trustee had no knowledge of the tax consequences of the plan.

The Trustee's testimony also established that the debtors and their accountants repeatedly advised the trustee that the debtors were responsible for the filing of tax returns and the payment of taxes. There was also evidence the Trustee relied upon advise given by his former counsel that the trust had no tax liability.

There was no credible evidence which showed the Trustee knew or, under the circumstances, should have known that he was responsible for the taxes prior to the Supreme Court's ruling.

The court notes that since the Supreme Court's tax decision, the Trustee has reached a settlement with the federal and state tax authorities for amounts substantially less than the remaining Trust assets. None of the tax authorities have pursued claims for penalties or sought to recover against Mr. Smith individually.[3]

CONCLUSIONS OF LAW

The court concludes that there is no basis for the debtors' claims against the Trustee or the bank.

I. Claims Against The Trustee

The debtors assert counterclaims of gross negligence, breach of fiduciary duty, and conspiracy to injure another in a trade, practice, addressed in order.

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[3] The tax authorities include Florida, Virginia and the United States.

A. Gross Negligence

The debtors failed to prove gross negligence. That term has been defined to mean "the equivalent of slight care." *Cadore v. Karp*, 91 So. 2d 806, 808 (Fla. 1957), or "that course of conduct which a reasonable and prudent person would know would probably and most likely result in injury to person or property." *Clement v. Deeb*, 88 So. 2d 505, 506 (Fla. 1956); *Bridges v. Speer*, 79 So. 2d 679, 682 (Fla. 1955). *See also Carraway v. Revell*, 116 So. 2d 16 (Fla. 1959). The law dictionary definition of gross negligence is the "intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting life or property of another." Black's Law Dictionary 931 (5th ed. 1979).

The undisputed facts offered at trial show that the Trustee acted properly. The bank proposed and the court confirmed a plan which failed to address income tax consequences of the plan. The debtors failed to present evidence of the potential tax liabilities of the plan at the confirmation. The Trustee's authority to act had not yet begun. Thereafter, the debtors and their accountants led the Trustee to believe they would file tax returns and pay taxes. Even the Trustee's then counsel advised that the Trust had no tax responsibilities. Upon learning that claims were being asserted that the Trust was responsible for taxes, the Trustee promptly initiated this adversary proceeding to determine the liability of the trust. Indeed, three courts considered the question and concluded that the Trustee was not responsible for filing tax returns or paying taxes at issue. Once the Supreme Court held that the Trust did have this obligation, the Trustee promptly

amended his adversary complaint to seek a determination of the amount and to impose the obligation to pay the tax upon the bank. In addition, he actively negotiated a compromise with each of the taxing authorities on terms favorable to the Trust and ensured the amounts were within the ability of the Trust to pay. Finally, the Trustee obtained a ruling of this court holding the bank liable for having proposed a plan without regard or provision for the payment of such taxes.[4]

These facts do not amount to "slight care" or to conduct which would "probably" result in injury, or would show a "reckless disregard of a manifest duty." This conduct reflects a high degree of care and a proper and reasonable response to a highly unusual and difficult problem.

Accordingly, judgment is entered in favor of the Trustee on the debtors' claim of gross negligence.

B. Breach of Fiduciary Duty

The debtors have failed to demonstrate any breach of fiduciary duty by the Trustee. In a related proceeding in which the debtors sought damages against the Trustee and the bank for, *inter alia*, the failure to establish reserves for taxes, the district court held that the Trustee does not owe the debtors ordinary common law fiduciary duties, but only those duties defined by the confirmed

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[4] This ruling is limited to liability. A trial on damages will be set by separate order.

plan. *See In re Holywell*, 93 B.R. 780, 783 (S.D. Fla. 1988), *aff'd*, No. 88-6187 (11th Cir. July 7, 1989).[5]

In that case, the district court ruled "the allegations of misconduct refer not to the field left to [the trustee's] discretion, but rather to duties that were required by the Confirmed Plan of Reorganization. The [debtors] assert that the Plan established a minimum standard of care, and that the Trustee was still liable under a common law duty to a higher standard." *In re Holywell*, 93 B.R. at 783 (emphasis deleted). The court rejected that contention, stating:

> This argument overlooks the fact that the [debtors] are not claiming that the Trustee breached his common law duty while acting within the provisions of the Plan, but rather that his actions under the Plan *themselves* breached his common law. *Id.*

As phrased by the court, the issue was not whether the plan relieved the Trustee of his common law duty, but whether those duties required of him by the plan were controlling. *Id.* The court held that the plan bound the debtors,[6] and concluded that the Trustee was relieved of personal liability. *Id.*

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[5] That complaint sounded in negligence and breach of common law fiduciary duties, and sought discharge of the Trustee. *In re Holywell*, 93 B.R. at 782.

[6] *Citing In re Sanders*, 81 B.R. 496, 499 (Bankr. W.D. Ark. 1987); *In re Jartran*, 76 B.R. 123, 125 (Bankr. N.D. Ill. 1987); *In re St. Louis Freight Lines, Inc.*, 45 B.R. 546, 552 (Bankr. E.D. Mich. 1984). *See also* 11 U.S.C. § 1141.

This decision is binding upon the issue of the standard of care required by the Trustee. He is not liable to the debtors on the claim of breach of fiduciary duty because he carried out the obligations imposed by the plan and acted reasonably in meeting the obligation to determine and pay the taxes due as a result of implementation of the bank's plan.

Even assuming that decision is not applicable,[7] the debtors have not shown a breach of any duty the Trustee owed to them. The Trustee owed the debtors the duty to carry out the terms of the plan as provided by 11 U.S.C. § 1142. The debtors do not claim that duty was breached. The Trustee was also obligated to conduct himself in a lawful manner in carrying out the plan. He did that. The Trustee complied with each court order governing the tax issues. Upon the Trust being required to file returns and pay taxes, the Trustee did so. The debtors have not demonstrated that the Trustee's actions constitute a breach of any duty the Trustee owed to them.

C. Conspiracy To Injure The Debtors' Trade, Practice Or Profession.

No conspiracy between the Trustee and the bank has been demonstrated. The only evidence of the alleged conspiracy introduced by the debtors is the letter of indemnity between the bank and the Trustee. By itself, it

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[7] The debtors appealed this court's denial of their motion to vacate the decision under F.R.Civ.P. 60(b). *Holywell v. Smith*, No. 93-0942 (S.D. Fla. appeal docketed May 3, 1993).

is not sufficient to prove an agreement to either accomplish an unlawful purpose or accomplish some purpose not in itself unlawful but by unlawful means. *See, e.g., Renpak Inc. v. Oppenheimer,* 104 So. 2d 642 (Fla.Ct.App. 1958).

It is the debtors' view that this agreement was demanded by the Trustee as part of a plot to implement the reorganization and thereby evade his duty to pay taxes with impunity. The unrefuted testimony, however, is that the Trustee demanded an indemnity agreement because, unlike the debtors or the bank, he was in no position to investigate or know the consequences of implementing the plan. He was not a party to any of these proceedings prior to confirmation of the plan. Further, the evidence is clear that under the agreement, the Trustee was to be indemnified for *any* consequence, and not just the payment of taxes.

The court does not believe that the mere existence of the indemnity agreement is proof of the existence of a conspiracy to evade the payment of taxes. Judgment is therefore entered in favor of the Trustee on the debtors' counterclaim for conspiracy to injure another in a trade, practice or profession.

1. Res Judicata And Collateral Estoppel.

This is neither the first nor even the second time the debtors have unsuccessfully sought legal redress based on the Trustee's conduct concerning the tax issues. It appears the issue is how many times and in how many

ways can the debtors challenge the Trustee's handling of these matters.

The Supreme Court's tax decision has not changed the result of the debtors' prior unsuccessful attacks on the Trustee. *See* p. 6 *infra*. The Supreme Court opinion addressed only Mr. Smith's duties to report and pay taxes as Trustee. Although the United States was held not to be a creditor under the plan for certain taxes, and hence was not bound by the plan because the taxes in question were post-confirmation liabilities of the Trust, the debtors are nonetheless bound by the terms of the plan. It provides for subordination of the debtors' claims to all other claims, including those for pre- and post-confirmation taxes. This is true even if the plan ultimately provides the debtors with less than that to which they might otherwise be entitled. *See In re St. St. Louis Freight Lines, Inc.*, 45 B.R. at 552. One way or another, the taxes have to be paid and this payment comes ahead of any payment to the debtors. The plan's subordination of the debtors' claims was not altered by the Supreme Court.

2. Waiver and Estoppel

The debtors have waived whatever right they may have had to assert their claims against the Trustee for his conduct in handling the tax issues and they are estopped from further pursuing such claims because of the representations they and their accountants made that the debtors would file the tax returns and pay the taxes due, and because of their failure to timely present evidence of the adverse tax consequences of the plan and to seek its modification in order to avoid or minimize the taxes. *See*

DeShong v. Seaboard Coast Line R. Co., 737 F.2d 1520 (11th Cir. 1984); *In re King Memorial Hosp., Inc.*, 19 B.R. 885 (Bankr. S.D. Fla. 1982). The court finds that the Trustee justifiably relied on this conduct in administering the plan. The debtors are not now entitled to pursue claims against the Trustee for the failure to pay taxes after having misled him to believe they were responsible for doing so.

Unlike the Trustee, the debtors and the bank were certainly in the best possible position to know, investigate the disclose the tax consequences, if any, of the reorganization scheme. The failure of the plan to include provision for the payment of taxes, the lack of any evidence as to tax consequences of the plan, and the debtors' conduct through mid-1987, constitute a clear waiver and estoppel of any right the debtors now claim to hold the Trustee responsible for such taxes.

3. Contributory Negligence.

Additionally, the debtors' conduct renders them contributorily negligent to the extent that they are barred from recovery against the Trustee because they helped create and perpetuate the view that the Trust had no tax obligations arising out of the sale of the Miami Center. The Trustee's conduct once the issue arose was free from fault, as he sought court orders to determine his responsibilities. Contributory negligence limits the right to damages which may be recovered to that portion which is proximately caused by the defendant's negligence. *See Williams v. Arai Hirotaki, Ltd.*, 931 F.2d 755 (11th Cir. 1991). In this case, even assuming that the debtors can prove

negligence, their right to recovery is eradicated by their own level of fault.

4. Reliance.

The Trustee had the right to rely on the advice of his prior counsel that the Trust was not responsible for the tax consequences of the plan even though that advice has proven to be erroneous. The plan provided the Trustee the right to engage professionals to assist him in carrying out the plan. *See* Art. V ¶ 3(o). Even under the debtors' theory that ordinary trust law governs the Trustee, the Trustee had the right to hire professionals for advice. *See* Fla. Stat. § 737.402(2)(y). It follows that the Trustee had the right to rely on the advice of counsel. *See, e.g., Scalise v. Nat'l. Utility Svc.*, 120 F.2d 938 (5th Cir. 1941); *Wohl v. Lewy*, 505 So. 2d 525 (Fla.Ct.App. 1987).

The Trustee also had the right to rely on the decisions of this court, the district court and the Eleventh Circuit that he was not responsible for the taxes. Neither the position taken by the Trustee nor those court decisions were frivolous. There is no recognized legal basis to hold the Trustee personally liable for having taken a position which was sanctioned by court orders.

5. Derived Immunity.

The Trustee is an "arm of the court" and is therefore not liable under the theory of derived judicial immunity for his failure to pay the taxes at issue prior to the Supreme Court's tax decision. Courts have recognized that "judicial immunity not only protects judges against

suits from acts done within their jurisdiction, but also spreads outward to shield public servants, including . . . trustees . . . " *See In re Jacksen*, 105 B.R. 542 (9th Cir. B.A.P. 1989), *quoting Bennett v. Williams*, 87 B.R. 122, 123 (S.D. Cal. 1988). A trustee may protect himself from personal liability by seeking instruction from the court, *Mosser v. Darrow*, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951), which is exactly what Mr. Smith did in this case. Because he did, the Trustee is entitled to derived judicial immunity because he performed an integral part of the judicial process by carrying out the plan and acting pursuant to court orders. *Jacksen*, 105 B.R. at 545, *citing Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir. 1986); *Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 19891 [sic]). *See also Gregory v. U.S.*, 942 F.2d 1498, 1500 (10th Cir. 1991).

Neither *King v. U.S.*[7] nor *Nicholas v. U.S.*,[8] both cited by the debtors, is applicable to the facts of this case nor do they change the result. In each of those cases, the United States pursued claims against bankruptcy trustees under 31 U.S.C. § 3713[9] in connection with their handling

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[7] 379 U.S. 329 (1964)

[8] 384 U.S. 678 (1966).

[9] 31 U.S.C. § 3713 provides:

(a)(1) A claim of the United States Government shall be paid first when –

(A) a person indebted to the Government is insolvent and –

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

of tax matters.[10]

Initially, it is clear that § 3713 is not applicable to cases under title 11. *See* 31 U.S.C. § 3713(a)(2). In addition, *King* is not applicable because, unlike here, the trustee in that case was aware of the government's proof of claim for taxes and deliberately sought to evade payment by colluding with the debtor and paying other creditors, thereby leaving no funds with which to pay the government's claim. None of that happened in this case.

In *Nicholas,* the issue was limited to whether the bankruptcy trustee was required to pay penalties imposed by the IRS – there being no question of the Trustee's liability for the underlying taxes. As previously noted, the United States expressly waived any claim for penalties in this case.

The court concludes the Trustee is not liable to the debtors pursuant to the doctrine of derived judicial immunity.

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

[10] Notably, the federal government and not a private party sought relief under § 3713. In this case, the United States has waived penalties and claims of personal liability against the Trustee.

6. The Debtors Are Guilty of Inequitable Conduct.

The debtors have engaged in inequitable conduct which precludes any recovery against the Trustee, either individually or in his capacity as Trustee. The debtors appear before the court with unclean hands. Mr. Gould has been held in contempt and substantial fines have been imposed on him on several occasions for misconduct involving interference with the administration of the trust and conversion of its assets. *See Gould v. Smith*, No. 88-0628 slip op. (S.D. Fla. March 6, 1990); *Gould v. Smith*, No. 89-2629-CIV-MARCUS slip op. (S.D. Fla. August 31, 1993) (Memorandum Opinion and Order of Final Judgment).

In addition, once it became clear that the Trust was responsible for filing tax returns, the debtors interfered with the Trustee's efforts to determine the correct amount of taxes in his negotiations with the IRS.[11] They have objected to each of the tax settlements reached by the Trustee, complaining that the tax authorities should be required to be paid from Mr. Smith's individual assets rather than from the Trust, even though they previously argued to the United States Supreme Court that the taxes

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[11] For example, Mr. Gould filed an IRS Form 870 in an unsuccessful attempt to bind the Trustee to the IRS' initial determination of the amount due on his bankruptcy estate even though the Trustee asserted that amount to be zero. The debtors represented to the courts that the tax liabilities for which the Trust was responsible exceeded $35 million, and filed an application for a reward with the IRS. The Trustee determined the taxes to be but a fraction of that sum and successfully negotiated with the IRS to reduce the amount to be paid.

had to be paid from Trust assets. In their application filed in the United States Supreme Court to stay the Eleventh Circuit's mandate of its tax decision and to enjoin the disbursement of Trust assets during the appeal,[12] the debtors argued at p. 3: "As we demonstrate below, the statute [referring to 26 U.S.C. § 6012(b)] requires resort to the trust fund." The debtors once again changed their position and now claim that Trust monies should not be used because Mr. Smith is personally liable for the payment of Trust tax obligations. Such inequitable conduct bars the debtors from now seeking recovery from the Trustee.

7. Mootness.

By separate Findings of Fact and Conclusions of Law on the Trustee's claims against the bank in this adversary proceeding, the court has entered a judgment on liability against the bank for negligent misrepresentation and to enforce the indemnity agreement.[13] As a result, the debtors' claims against the Trustee are mooted because of the bank's liability to the Trustee in connection with the obligation to pay taxes.

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[12] This was filed on January 17, 1991 in the United States Supreme Court, Case No. A-546.

[13] This ruling was limited to liability; there will be a separate trial on damages.

II. Claims Against The Bank Of New York

The debtors have also asserted cross-claims against the bank for negligent misrepresentation, fraud in connection with a case under title 11, and conspiracy to injure another in a trade, practice or profession.

A. Negligent Misrepresentation and Fraud

The debtors have failed to prove their claims of negligent misrepresentation and fraud.

To the extent the bank was negligent in its representations in the disclosure statement concerning the feasibility of the plan and by the omission of any tax analysis or provision for payment of taxes in its plan, any damage suffered was by the Trust. The debtors are residual beneficiaries of the Trust, and because the Trust prevailed on liability on its claims against the bank for negligent misrepresentation and to enforce the indemnity agreement in connection with the tax issues, the debtors have not been damaged. The court will determine the amount of any damages owed by the bank to the Trust at a separate trial. The debtors, as beneficiaries of the Trust, do not have standing separate from the Trustee to recover from the bank under such circumstances.

As to the debtors' claims of intentional misrepresentation and fraud in connection with a case under title 11, they failed to prove that the representations or omissions were unknown to them, or that they relied in any material respect on these misrepresentations or omissions, or that they suffered damages separate from damages sustained by the Trust as a result of the bank's conduct.

Rather, the evidence showed that the taxes required to be paid by the Trustee are consequences which the debtors anticipated and would have borne had the Miami Center been sold outside the bankruptcy court. Moreover, the tax liability involved was one which would have existed in all events under the debtors' own proposed plans of reorganization.

1. Waiver and Estoppel

Just as was found in connection with their claims against the Trustee, the debtors have waived and are estopped from pursuing their claims against the bank because they claimed for almost two years after the effective date of the plan that it was their duty to file returns and pay the taxes due the IRS. Also, the debtors' failure to present evidence to support modification of the plan when provided with an opportunity to do so before the plan became effective precludes them from pursuing their claims.

Further, at trial, the evidence showed that debtor Gould filed the income tax returns for 1984 through 1986 for his estate and for two of the partnership debtors without the Trustee's approval or consent. Accordingly, the doctrines of waiver and estoppel preclude recovery.

2. Res Judicata

Claims that the bank's confirmed plan and disclosure statement are wrongful as to the debtors are barred by the doctrine of *res judicata*. The debtors appealed the order confirming the plan unsuccessfully to the district

court, and the court of appeals held the appeal should have been dismissed as moot; the Supreme Court denied review. They are thus precluded from further attacks on the plan.

B. Conspiracy To Injure Another In A Trade, Practice Or Profession

The debtors failed to present any evidence at trial of a conspiracy by the bank or any of its representatives to injure the debtors' trade, practice, profession or business. *See* subsection I, c, *infra*. There could be no injury by the bank to the debtors' trade, practice or profession after their bankruptcy discharge. Any claim for injury prior to discharge would, under the confirmed plan and Bankruptcy Code § 541(a), be a chose in action belonging to the Miami Center Liquidating Trust and not to the debtors.

III. Holywell's Failure to Appear At Trial.

In addition to all of the reasons why the cross-claims and the counterclaims filed by Holywell Corporation are properly dismissed, these claims are dismissed because the company failed to appear at trial. No attorney appeared for Holywell at the trial. It is well established that a corporation may not appear through its officers, directors or agents and must engage counsel to represent its interests in legal proceedings. *See National Independent Theater Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602 (11th Cir. 1984), *cert. denied*, 471 U.S. 1056 (1985); *James v. Daley & Lewis*, 406 F. Supp. 645 (D.Del. 1976);

MacNeil v. Hearst Corp., 160 F. Supp. 157 (D.Del. 1958). Along with all of the reasons set forth in sections I and II, the failure of counsel of record or any other attorney to appear on behalf of Holywell at the duly scheduled trial warrants entry of judgment in favor of the Trustee and the bank on all of Holywell's counterclaims and cross-claims, respectively.

It is therefore

ORDERED AND ADJUDGED that judgment is entered in favor of the Trustee on debtors Gould and Holywell's counterclaims, and in favor of the Bank of New York on debtors Gould and Holywell's cross-claims.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 30 day of September, 1993.

SIDNEY M. WEAVER
SIDNEY M. WEAVER
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT

Conformed copies provided
to Herbert Stettin for
distribution to all counsel
of record and interested
parties.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE BANK OF NEW YORK, UNITED STATES OF AMERICA, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, THEODORE B. GOULD, and MIAMI CENTER CORPORATION,

Defendants.
_____/

Adversary No. 87-0627-BKC-SMW-A

Case Nos.
84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

ORDER DENYING HOLYWELL CORPORATION AND THEODORE B. GOULD'S MOTION FOR REHEARING OF JUNE 22, 1993 ORDER DENYING MOTION TO ENJOIN TRUSTEE FROM USE OF TRUST FUNDS TO PAY TAXES, ETC.

THIS CAUSE having come on to be heard before the undersigned Judge on August 26, 1993 upon motion of Holywell Corporation and Theodore B. Gould for rehearing of the Court's Order of June 22, 1993 denying the motion of Holywell Corporation and Theodore B. Gould for an order enjoining Fred Stanton Smith from disbursing cash of the fiduciary estates to pay taxes, etc., and the Court having reviewed the pleadings on file, having

heard argument of counsel and being otherwise advised in the premises, it is hereupon ordered and adjudged that the said motion be and the same is hereby denied.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida, this 27 day of August ~~September~~ 1993.

SIDNEY M. WEAVER
CHIEF UNITED STATES
BANKRUPTCY JUDGE

Conformed copies to
Herbert Stettin for
distribution to all
counsel of record
and interested parties

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE BANK OF NEW YORK, UNITED STATES OF AMERICA, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, THEODORE B. GOULD, and MIAMI CENTER CORPORATION,

Defendants.

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Adversary No. 87-0627-BKC-SMW-A

Case Nos.
84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

ORDER APPROVING STIPULATION AND JOINT MOTION FOR APPROVAL OF COMPROMISE AND SETTLEMENT OF CLAIMS OF THE UNITED STATES OF AMERICA

THIS MATTER having come before the Court on September 21, 1993 on the Stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America, filed by Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("Trustee"), and the United States of America, appearing specially for the purpose of this motion, and the Court having reviewed the motion and the file, having heard

the testimony, argument of counsel, and having considered the objections of Debtors Theodore B. Gould and Holywell Corporation, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Due and proper notice of the Stipulation and Joint Motion was given to all creditors and parties in interest.

2. No objections to the Stipulation and Joint Motion were filed except the jointly filed objections of Holywell Corporation and Theodore B. Gould.

3. Mr. Gould appeared *pro se* at the hearing on the Stipulation and Joint Motion, and indicated he does not object to the amount by which the claims are being compromised. His other objections were stated into the record. No counsel appeared for Holywell Corporation.

4. The United States of America has asserted taxes against the Miami Center Liquidating Trust, the bankruptcy estate of Theodore B. Gould and Holywell Corporation and subsidiaries in a sum in excess of $50 million. The settlement is for $10 million, in addition to the approximately $3.3 million already paid.

5. The terms of the settlement are set forth in detail in the Stipulation and Joint Motion, which is attached hereto and made a part hereof.

6. Robert Panoff, Esquire, the Trustee's tax counsel, testified in support of the settlement. He testified that the amount of taxes sought to be recovered by the United States of America is in excess of $50 million, and that given the hazards of litigation, the potential liability of

the Trust would be far in excess of the amount for which the claims are to be settled. He further testified that the settlement of the taxes as proposed in the Stipulation and Joint Motion is reasonable and in the best interest of the Miami Center Liquidating Trust in light of all of the facts and the hazards of litigation.

7. The Court notes that the United States of America has not made any assessments against the Trustee individually and has waived penalties. The United States of America has further indicated that the Trustee will not have any exposure to the United States, in his individual and personal capacity, for the tax liabilities set forth in the Stipulation and Joint Motion.

8. Counsel for the United States of America has also stated that the settlement, as set forth in the Stipulation and Joint Motion, does not involve the Miami Center Joint Venture.

9. The standards for approving a compromise set forth in *In re Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980), have been established and the terms of the proposed settlement appear to be reasonable and in the best interest of the Miami Center Liquidating Trust.

10. The Court is fully familiar with the history of these proceedings, and has considered the pleadings, the facts, the objections, and argument of counsel. The Court is apprised of all of the necessary facts for an intelligent, objective and educated evaluation of this compromise. The terms of the compromise, when compared with the hazards of litigation, is eminently reasonable. The proposed compromise falls well above the "lowest point in the range of reasonableness." *See In re Caltronics Services,*

Inc., 762 F.2d 185 (2d Cir. 1985); *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983).

11. The payment to the United States of America of $10 million, in addition to the approximately $3.3 million previously paid, is without prejudice to the rights of the Trustee to assert any claims he may have against any party (except the United States of America), including, but not limited to, The Bank of New York.

12 The Court orders that the proposed settlement contained in the Stipulation and Joint Motion, attached hereto and made a part hereof, be and the same is hereby approved. The Trustee is authorized and directed to take the necessary actions to consummate the settlement in accordance with its terms.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida, this 30 day of September 1993.

SIDNEY M. WEAVER
CHIEF UNITED STATES
BANKRUPTCY JUDGE

Conformed copies to
Herbert Stettin for
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counsel of record
and interested parties

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases Nos.: 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,

Debtors.

ORDER ON EMERGENCY MOTION TO TREAT PROCEEEDS OF THE SALE AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

The bank of New York ("BNY"), a secured creditor, moved this Court, pursuant to Bankruptcy Code § 363 and Bankruptcy Rule 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washignton Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on, August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1818 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Association ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion

of BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further order of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould of the net proceeds from the sale of the Washington Properties, except for an amount of $264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net

proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of $70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is

ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of $70,000 shall be released immediately to Holywell to pay its salaries and other business

expenses due on December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each months its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31 day of December 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

1. 26 U.S.C. § 6043, ***Liquidating, etc., transactions,*** provides in part:

(a) ***Corporate liquidating, etc., transactions.*** Every corporation shall – (1) Within 30 days after the adoption . . . of a resolution or plan for the . . . liquidation of the whole or any part of its capital stock, [a corporation shall] make a return setting forth the terms of such resolution or plan. . . .

2. 26 U.S.C. § 6034A. ***Information to beneficiaries of estates and trusts,*** provides, in part:

> (a) *General rule.* The fiduciary of any estate or trust required to file a return under section 6012(a) ["(4) Every trust have for the taxable year any taxable income, or having gross income of $600 or over, regardless of the amount of taxable income"] for any taxable year shall, on or before the date on which such return was required to be filed, furnish to each beneficiary . . . (2) to whom any item with respect to such taxable year is allocated, a statement containing such information required to be shown on such return as the Secretary may prescribe.

3. 28 U.S.C. § 2201, ***Creation of remedy,*** provides, in part:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought [in] . . . a proceeding under Section 505 or 1146 of title 11 . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . . Any such declaration shall have the force and effect of a final

judgment or decree and shall be reviewable as such.

4. 28 U.S.C. § 157(c)(1) provides that "[a] bankruptcy judge may hear a proceeding that is not a score proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit ***proposed findings of fact*** and conclusions of law to the district court, and ***any final order or judgment shall be entered by the district judge*** (emphasis added) after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected."